Applicant Details

First Name	**Sarah**
Last Name	**Fix**
Citizenship Status	**U. S. Citizen**
Email Address	**sfix@sandiego.edu**
Address	**Address** **Street** **3222 Reynard Way** **City** **San Diego** **State/Territory** **California** **Zip** **92103** **Country** **United States**
Contact Phone Number	**5094137627**

Applicant Education

BA/BS From	**Whitman College**
Date of BA/BS	**May 2019**
JD/LLB From	**University of San Diego School of Law** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=90510&yr=2012**
Date of JD/LLB	**May 21, 2022**
Class Rank	**10%**
Law Review/ Journal	**Yes**
Journal(s)	**San Diego Law Review**
Moot Court Experience	**No**

Bar Admission

Admission(s)	**California**

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**Yes**

Specialized Work Experience

Recommenders

Schopler, Andrew
andrew_schopler@casd.uscourts.gov

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Sarah Fix
(509) 413-7627 · sarah_fix@casd.uscourts.gov

June 27, 2023

The Honorable Morgan Christen
605 W. 4th Ave., Suite 252
Anchorage, AK 99501

Dear Judge Christen:

The summer going into my junior year of college, my soccer coach assigned my team to read a book titled *Grit: The Power of Passion and Perseverance* by Angela Duckworth. As a math major, required reading was not exactly in my wheelhouse. (Ironic, I know). But as I begrudgingly made my way through the book, I came across a quote that stuck with me: "Enthusiasm is common, endurance is rare." I always considered enthusiasm to be one of my strengths, but in law school I quickly realized that enthusiasm is very common amongst law students and young attorneys. Enthusiasm by itself would not be enough to set me apart.

So, I thought of the quote I read years before and started focusing on endurance. At school my friends only agreed to sit next to me in class if I limited myself to raising my hand twice per period, because they knew I participated as much as possible and they did not want to draw "too much attention." In my current clerkship I have worked diligently to have at least one long-form written order ready for filing every other week in addition to managing the rest of my caseload. My enthusiasm for the law and for learning makes me a common applicant, but my endurance makes me an exceptional candidate for a clerkship in your chambers for the Fall 2025–Fall 2026 term.

In addition to my personal qualifications, I graduated in the top 6% of my class, earning my degree *magna cum laude*. I was inducted into the Order of the Coif and received High Distinction recognition for completing over 250 hours of pro bono service. In my last year of law school, I Bluebooked over 5,100 footnotes as Managing Editor of *San Diego Law Review* and argued a successful appeal in front of the Ninth Circuit on behalf of an asylum-seeker. Over the last nine months clerking for a Senior District Judge, I have drafted over thirty opinions that were ultimately filed with few edits or modifications, while working closely with my co-clerks to ensure all orders leaving chambers are of the highest quality. And finally, spending the upcoming two years in the active chambers of District Judge Schopler will allow me to further expand my horizons and hone my writing skills so that I may hit the ground running in your chambers.

My combination of endurance and extensive experience in legal writing and research will allow me to exceed at the next level in your chambers. Thank you for your time and consideration.

Respectfully,

Sarah M. Fix

Sarah Fix
(509) 413-7627 • sarah_fix@casd.uscourts.gov

EDUCATION

University of San Diego School of Law, San Diego, CA | Juris Doctor, *magna cum laude* *May 2022*
GPA: 3.89; 13/248 (Top 6%)
Honors: Order of the Coif, Managing Editor of *San Diego Law Review*, Pro Bono High Distinction Recognition

Whitman College, Walla Walla, WA | Bachelor of Arts in Mathematics *May 2019*
Honors: Women's Varsity Soccer, Team Captain 2019 Season

BAR ADMISSIONS

California, December 2022

EXPERIENCE

U.S. District Court for the Southern District of California, San Diego, CA *Incoming Fall 2023*
Judicial Law Clerk for the Honorable Andrew G. Schopler

U.S. District Court for the Southern District of California, San Diego, CA *Fall 2022–Fall 2023*
Judicial Law Clerk for the Honorable M. James Lorenz
Managing over 50 civil cases. Drafting, reviewing, and filing orders on a wide variety of constitutional issues from qualified immunity to Fourth Amendment unreasonable search and seizure. Prepared omnibus order on six defendants' cross-motions for summary judgment in multi-million dollar § 1983 case. Assisting in reviewing and drafting order on a preliminary injunction in high profile Second Amendment case.

University of San Diego School of Law Appellate Clinic, San Diego, CA *Fall 2021; Spring 2022*
Briefed and argued successful immigration appeal in front of the Ninth Circuit Court of Appeals.

U.S. District Court for the Southern District of California, San Diego, CA *Spring 2022*
Judicial Extern for the Honorable Michael S. Berg
Drafted a Report and Recommendation on a unique motion to vacate a judgment and drafted orders on motions to compel discovery in foreign proceedings. Prepared Report and Recommendation on a social security disability appeal and on a habeas corpus petition.

Office of the General Counsel, Department of the Navy, San Diego, CA *Fall 2021*
Law Clerk
Prepared responses to military contract protests and legal memoranda in areas of employment law, intellectual property, and the Freedom of Information Act.

U.S. District Court for the Southern District of California, San Diego, CA *Fall 2020; Summer 2021*
Judicial Extern for the Honorable Andrew G. Schopler
Drafted a Report and Recommendation on an evidence-spoliation motion that was later cited in a billion-dollar civil dispute. Researched current federal law, prepared written bench memoranda, and drafted extensive discovery orders in civil cases including an order on a complex motion to compel.

University of San Diego School of Law, San Diego, CA *Summer 2021*
Research Assistant for Professor Dov Fox
Compiled case studies and provided in-depth analysis in emerging areas of health law and bioethics.

U.S. Attorney's Office, Criminal Division, **Major Frauds**, San Diego, CA *Spring 2021*
Law Clerk
Wrote memoranda on specific legal issues related to ongoing major fraud cases including healthcare fraud, Bank Security Act violations, wire fraud, and cryptocurrency investment fraud. Attended pre-indictment meetings with defense attorneys in international money laundering case.

LANGUAGES AND INTERESTS

Amateur Beekeeping | Proficient in French | Real Analysis (theoretical mathematics)

Date Issued: 11-JUN-2022
Student Name: Sarah M Fix
Student ID: 009339119
Issued To: Sarah Fix
Parchment DocumentID: 39154876

University of San Diego®
SCHOOL OF LAW

Course Level: Law
Only Admit: Fall 2019

Current Program
Juris Doctor
Program : Juris Doctor
College : School of Law
Campus : Law
Major : Law

Degrees Awarded Juris Doctor 21-MAY-2022
Primary Degree
Program : Juris Doctor
College : School of Law
Campus : Law
Major : Law
Dept. Honors: Order of the Coif
Inst. Honors: Magna Cum Laude

SUBJ NO.	COURSE TITLE	CRED	GRD	PTS	R
INSTITUTION CREDIT:					
Fall 2019					
LWAA 510	Civil Procedure	4.00	A- 3.6	14.40	
LWAA 525	Criminal Law	4.00	A 4.0	16.00	
LWAA 540	Torts	4.00	A- 3.7	14.80	
LWAA 545	Legal Writing & Research I	2.00	B+ 3.2	6.40	
LWAA 575	Experiential Advocacy Prac. I	1.00	H	0.00	
Experiential Learning					
Ehrs: 15.00 GPA-Hrs: 14.00 QPts: 51.60 GPA: 3.69					
* Cum-Ehrs: 15.00 GPA-Hrs: 14.00 QPts: 51.60 GPA: 3.69					
Spring 2020					
LWAA 515	Constitutional Law I	4.00	P	0.00	
LWAA 520	Contracts	4.00	P	0.00	
LWAA 530	Property	4.00	P	0.00	
LWAA 546	Legal Writing & Research II	2.00	P	0.00	
LWAA 576	Experiential Advocacy Prac. II	1.00	P	0.00	
Experiential Learning					
Ehrs: 15.00 GPA-Hrs: 0.00 QPts: 0.00 GPA: 0.00					
* Cum-Ehrs: 30.00 GPA-Hrs: 14.00 QPts: 51.60 GPA: 3.69					

********** CONTINUED ON NEXT COLUMN **********

SUBJ NO.	COURSE TITLE	CRED	GRD	PTS	R
Comments Continued:					
Due to the COVID-19 pandemic, Spring 2020 grading was mandatory Pass/No Credit, except for grades previously posted for courses completed early in the semester.					
All courses taken are reflected on the transcript.					
Fall 2020					
LWCR 530	Death Penalty	2.00	A 3.9	7.80	
LWFC 520	Child Rights And Remedies	3.00	A 4.0	12.00	
LWGC 590	Trusts & Estates	3.00	A+ 4.2	12.60	
LWLP 529	Evidence	4.00	A 3.9	15.60	
LWVL 598	Judicial Externship	4.00	P	0.00	
Experiential Learning					
LWWI 546	Law Review Comment	0.00	P	0.00	
Written Work					
Ehrs: 16.00 GPA-Hrs: 12.00 QPts: 48.00 GPA: 4.00					
* Cum-Ehrs: 46.00 GPA-Hrs: 26.00 QPts: 99.60 GPA: 3.83					
CLASS RANK: 22/262					
Spring 2021					
LWAA 590	Tax I	3.00	A 4.1	12.30	
LWCR 520	Criminal Procedure I	3.00	A- 3.6	10.80	
LWPP 525	Constitutional Law II	3.00	A- 3.7	11.10	
LWVL 596	Agency Externship I	5.00	P	0.00	
Experiential Learning					
LWWI 546	Law Review Comment	2.00	P	0.00	
Written Work					
Ehrs: 16.00 GPA-Hrs: 9.00 QPts: 34.20 GPA: 3.80					
* Cum-Ehrs: 62.00 GPA-Hrs: 35.00 QPts: 133.80 GPA: 3.82					
CLASS RANK: 21/263 TIE					
Summer 2021					
LWVL 598	Judicial Externship	4.00	P	0.00	
Experiential Learning					

********** CONTINUED ON PAGE 2 **********

Law School Registrar

Date Issued: 11-JUN-2022
Student Name: Sarah M Fix
Student ID: 009339119
Issued To:

University of San Diego®
SCHOOL OF LAW

SUBJ	NO.	COURSE TITLE	CRED	GRD	PTS
Institution Information continued:					
	Ehrs: 4.00	GPA-Hrs: 0.00	QPts: 0.00	GPA:	0.00
* Cum-Ehrs: 66.00	GPA-Hrs: 35.00	QPts: 133.80	GPA: 3.82		
Fall 2021					
LWAA	580	Professional Responsibility	3.00	A-	10.50
				3.5	
LWBC	545	Corporations	4.00	A	16.00
				4.0	
LWLP	570	Remedies	4.00	A+	17.20
				4.3	
LWVL	501	Appellate Clinic	2.00	H	0.00
Experiential Learning					
	Ehrs: 13.00	GPA-Hrs: 11.00	QPts: 43.70	GPA:	3.97
* Cum-Ehrs: 79.00	GPA-Hrs: 46.00	QPts: 177.50	GPA: 3.86		
CLASS RANK: 20/245					
Spring 2022					
LWGC	520	Fundamentals-Bar Exam Writing	2.00	P	0.00
LWGC	576	Multistate Bar Exam Prep	4.00	A	16.00
				4.0	
LWGC	581	Privacy and Data Security	3.00	A+	12.60
				4.2	
Written Work					
LWVL	501	Appellate Clinic	2.00	H	0.00
Experiential Learning					
LWVL	598	Judicial Externship	1.00	P	0.00
Experiential Learning					
	Ehrs: 12.00	GPA-Hrs: 7.00	QPts: 28.60	GPA:	4.09
* Cum-Ehrs: 91.00	GPA-Hrs: 53.00	QPts: 206.10	GPA: 3.89		
Pro Bono Recognition with High Distinction					
GRADUATING CLASS RANK: 13/248 TIE					

********** TRANSCRIPT TOTALS **********

	Earned Hrs	GPA Hrs	Points	GPA
TOTAL INSTITUTION	91.00	53.00	206.10	3.89
TOTAL TRANSFER	0.00	0.00	0.00	0.00
OVERALL	91.00	53.00	206.10	3.89

********** END OF TRANSCRIPT **********

Law School Registrar

NAME: Fix, Sarah M. WHITMAN ID: 0874988 DEGREE: Bachelor of Arts DATE: 05/19/2019 RANK: 260/328
BIRTHDATE: 11/19/96 GENDER: Female MAJOR: Mathematics EXAM: Pass
HS GRAD DATE: 06/15 MATRIC: 09/01/15 MINOR: UNDERGRAD HONORS:
CONCENTRATION:

DEPT/NUM	COURSE TITLE	CRD	GRD	GRDPT
FALL 2015 - Academic Distinction				
GENS 145	Encounters	4	A-	14.8
POL 121	Intro Anc& Medieval Pol Theory	4	A-	14.8
PSYC 110	Introduction to Psychology	4	A	16.0
ANTH 206	Anthropology and Europe	4	B+	13.2
SEM GR CREDITS ATT: 16 EARN: 16 GR PTS: 58.8 GPA: 3.675				
CUM GR CREDITS ATT: 16 EARN: 16 GR PTS: 58.8 GPA: 3.675				
SPRING 2016				
GENS 146	Encounters	4	A	16.0
MATH 126	Calculus II	3	B	9.0
FREN 305	Adv Composition and Stylistics	4	A-	14.8
HIST 213	The US and the Wars with Iraq	4	B	12.0
SEM GR CREDITS ATT: 15 EARN: 15 GR PTS: 51.8 GPA: 3.453				
CUM GR CREDITS ATT: 31 EARN: 31 GR PTS: 110.6 GPA: 3.567				
FALL 2016				
FREN 320	Politics & Aesthetics of Love	4	B	12.0
MATH 225	Calculus III	4	B	12.0
PHYS 155	General Physics I	4	C+	9.2
POL 147	International Politics	4	B	12.0
SSRA 254	Intercoll Soccer (Women)	1	CR	0.0
SEM GR CREDITS ATT: 16 EARN: 17 GR PTS: 45.2 GPA: 2.825				
CUM GR CREDITS ATT: 47 EARN: 48 GR PTS: 155.8 GPA: 3.314				
SPRING 2017				
MATH 235	Calculus Laboratory	1	A	4.0
PHYS 156	General Physics II	4	A-	14.8
PSYC 210	Psychological Statistics	3	A	12.0
MATH 244	Differential Equations	3	B-	8.1
MATH 240	Linear Algebra	3	B	9.0
SEM GR CREDITS ATT: 14 EARN: 14 GR PTS: 47.9 GPA: 3.421				
CUM GR CREDITS ATT: 61 EARN: 62 GR PTS: 203.7 GPA: 3.339				
FALL 2017				
CS 167	Computational Prob Solvng	4	B+	13.2
MATH 339	Operations Research	3	B	9.0
SSRA 254	Intercoll Soccer (Women)	1	CR	0.0
HIST 261	America in Vietnam	4	B	12.0
PHYS 245	20th Century Physics	3	A	12.0
PHYS 255	20th C Physics Laboratory	1	A-	3.7
SEM GR CREDITS ATT: 15 EARN: 16 GR PTS: 49.9 GPA: 3.326				
CUM GR CREDITS ATT: 76 EARN: 78 GR PTS: 253.6 GPA: 3.336				
SPRING 2018				
HIST 290	Hist and Soc of Rock'n'Roll	4	A-	14.8
MATH 260	Intro Higher Mathematics	4	C	8.0
SSRA 200	First Aid	1	CR	0.0
SSRA 205	Adv Speed and Agility Training	1	CR	0.0
PSYC 217	Psychology of Law	3	A-	11.1
MATH 287	Independent Study in Geometry	3	P	0.0
SEM GR CREDITS ATT: 11 EARN: 16 GR PTS: 33.9 GPA: 3.081				
CUM GR CREDITS ATT: 87 EARN: 94 GR PTS: 287.5 GPA: 3.304				
FALL 2018				
SSRA 117	Beginning Golf	1	CR	0.0
MATH 455	Real Analysis	4	C	8.0
MATH 475	Abstract Algebra	4	C	8.0
MUS 150	Music in Society	3	A	12.0
SSRA 254	Intercoll Soccer (Women)	1	CR	0.0
HIST 112	Modern Africa	4	B+	13.2
SEM GR CREDITS ATT: 15 EARN: 17 GR PTS: 41.2 GPA: 2.746				
CUM GR CREDITS ATT:102 EARN:111 GR PTS: 328.7 GPA: 3.222				
SPRING 2019 - Academic Distinction				
MATH 247	Statistics With Applications	3	A	12.0
MATH 497	Senior Project	4	B+	13.2
SSRA 487	ISR: Sports Medicine	3	A	12.0
ARTS 167	Beginning Painting	3	A	12.0
SEM GR CREDITS ATT: 13 EARN: 13 GR PTS: 49.2 GPA: 3.784				
CUM GR CREDITS ATT:115 EARN:124 GR PTS: 377.9 GPA: 3.286				

------------------- END OF RECORD TO DATE -------------------

Report Date: 06/09/21 Page: 1 of 1

Ms. Sarah M. Fix
7214 S Oak Rd
Spokane WA 99224-8233

Whitman College
Registrar

United States District Court
Southern District of California
Schwartz Courthouse
221 West Broadway, Suite 5160
San Diego, California 92101

Andrew G. Schopler
U.S. District Judge

Phone: (619) 557-6480
Fax: (619) 702-9932

June 2, 2023

Re: Sarah Fix

Courage and pink Crocs™. These are my first thoughts when Sarah Fix comes to mind. During interviews, we ask all applicants to tell us something interesting about themselves that's not on their resume. Sarah, in our first COVID-era remote interview, grinned and proudly lifted her foot to the camera to show that below her professional attire lurked a set of pink Crocs.

With that same cheeky grin and unabashed bravery, Sarah met every challenge in my chambers as an extern. And not just for one semester. Sarah impressed me so much that she was one of only a handful of externs ever invited back for a second externship. And she's the only extern I've ever hired for a full-time two-year clerkship (beginning this Fall).

Once you meet her, you'll instantly understand why. Sarah voraciously attacks each assignment, no matter how complex, and maintains an exceptional level of energy and interest in the work. She asks questions, adds value to every hearing, and even laughs at my mediocre jokes.

What's more, her work is excellent. Even when she was still in law school, I felt comfortable assigning Sarah to draft a spoliation-sanctions order in a complex class-action case. She did a tremendous job of analyzing the issues and crafted many well-written lines that I ultimately used in the final opinion. I can't wait for the end of her current clerkship with Judge Lorenz so she can return to my chambers.

In short, any judge looking for a talented, energetic, and Crocs-conscious young lawyer should jump at the chance to hire my once and future clerk Sarah. She has my highest possible recommendation.

Very truly yours,

Andrew G. Schopler
United States District Judge

Sarah Fix
(509)-413-7627 ▪ sarah_fix@casd.uscourts.gov

This writing sample is an order I drafted granting summary judgment in favor of Defendant, a corporation that owns and operates detention centers. Plaintiffs, three ex-detention officers employed by Defendant, filed claims for constructive termination claiming that their working conditions were intolerable due to Defendant's deficient response to the COVID-19 pandemic. The order was reviewed by my co-clerks who made minor edits and approved by Judge Lorenz for filing without any stylistic or substantive changes.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

MARGARITA SMITH, Plaintiff, v. CORECIVIC OF TENNESSEE, LLC, and DOES 1–25, Defendants.	Case No.: 20-cv-0808-L-DEB **ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT** **[ECF No. 45]**

GREGORY ARNOLD, Plaintiff, v. CORECIVIC OF TENNESSEE, LLC, and DOES 1–25, Defendants.	Case No.: 20-cv-0809-L-DEB **ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

ERICA BROOKS, Plaintiff, v. CORECIVIC OF TENNESSEE, LLC, and DOES 1–25, Defendants.	Case No.: 20-cv-0994-L-DEB **ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

Pending before the Court is Defendant CoreCivic of Tennessee, LLC's ("Defendant") omnibus motion for summary judgment. (ECF No. 45.) Plaintiffs Margarita Smith, Gregory Arnold, and Erica Brooks (collectively, "Plaintiffs") filed an omnibus opposition, (ECF No. 46), and Defendant replied, (ECF No. 49). The Court has jurisdiction pursuant to 28 U.S.C. § 1332. The Court decides the matter on the papers submitted and without oral argument. *See* Civ. L.R. 7.1(d.1). For the reasons stated below, Defendant's motion for summary judgment is granted.

I. INTRODUCTION

The Otay Mesa Detention Center ("OMDC") is a detention facility in San Diego, California that is owned and operated by Defendant. (ECF No. 49-1, at 3.)[1] Defendant has continuously operated OMDC from the beginning of the COVID-19 pandemic in January, 2020 to the present. (*Id.* at 5.) Plaintiffs worked at OMDC in early 2020. (*Id.* at 21–36.) Plaintiffs all resigned from their positions at OMDC in Spring of 2020. (*Id.*) Each Plaintiff filed an individual action against Defendant claiming constructive discharge in violation of four state and federal public policies due to Defendant's failure to adequately implement sufficient measures to mitigate the anticipated spread of COVID-19. (20-cv-0808, ECF No. 1; 20-cv-0809, ECF No. 1; 20-cv-0994, ECF No. 1.) Plaintiffs also brought claims for negligent supervision and intentional infliction of emotional distress that were independently dismissed. (20-cv-0808, ECF No. 10; 20-cv-0809, ECF No. 9; 20-cv-0994, ECF No. 9.) In March of 2021, case numbers 20-cv-809 and 20-cv-994 were transferred to the docket of Judge Lorenz pursuant to the Low-Number Rule. (20-cv-809, ECF No. 17; 20-cv-994, ECF No. 20.) Defendant now moves for summary judgment of all Plaintiffs' remaining claims for constructive discharge.

[1] Unless otherwise stated, all citations to electronically filed documents refer to documents filed on the docket in case number 20-cv-0808. All facts are derived from the parties' joint statement of undisputed material facts. (ECF No. 49-1.)

II. FACTUAL BACKGROUND[2]

A. Defendant's COVID Response

As the parties are well aware, the COVID-19 outbreak captivated public attention as early as January 2020. (ECF No. 49-1, at 16.) In February 2020, Defendant issued an initial Pandemic Coronavirus Plan. (*Id.* at 6.) By March 2020 Defendant began taking additional measures to address the spread of COVID-19 such as providing OMDC with educational signage regarding COVID-19 symptoms, handwashing, sanitation and cleanliness, mask use, social distancing, and steps to reduce the risk of exposure. (*Id.* at 9.) Despite these measures, employees at OMDC were generally prohibited from wearing masks in March 2020. (*See id.* at 15–16.)

On March 20, 2020, OMDC required screening at the front lobby for all persons entering the facility, but screening staff were not allowed to wear full personal protective equipment ("PPE") until they were required to do so on March 27. (*Id.* at 11, 15.) Also beginning March 20, Defendant allowed employees to wear facemasks in the presence of a symptomatic person. (*Id.* at 14.) Masks were required for staff working in a protective cohort or quarantine pod by the third week of March. (*Id.* at 15.) On March 23, the OMDC began serving meals to one housing unit at a time in the dining hall and encouraging detainees to limit seating to three people per table. (*Id.* at 12.) The OMDC also instructed staff to limit the number of individuals in the sallyport to fifteen. (*Id.* at 12.) Effective the next day employees were no longer required to use a fingerprint when clocking in. (*Id.* at 11.)

On March 30, 2020, OMDC informed staff that "Control Center is sanitizing radios and equipment as an additional precaution" and that staff "should still ensure equipment and areas are sanitized when possible." (*Id.* at 13.) OMDC set up a phone information

[2] All objections to evidence not relied upon by the Court are overruled.

system to allow staff to receive shift briefings via phone instead of in-person and banned close-contact training on the same day. (*Id.*)

Beginning April 3, 2020, all OMDC employees and staff were allowed to wear a facemask in the facility. (*Id.* at 16.) Detainees were offered masks on April 10 at no cost. (*Id.*) OMDC's warden sent an email to all staff on April 20 recommending they wear masks, and the use of masks became mandatory for all OMDC employees on April 28. (*Id.*)

B. Margarita Smith

Defendant Margarita Smith was hired by Defendant as a Detention Officer at a different facility on April 13, 2009. (*Id.* at 32.) When Smith's facility was closed she was transferred to OMDC and eventually promoted to the position of Senior Detention Officer in 2016. (*Id.*) Smith took a leave of absence due to personal illness from February 28, 2020, to March 9, 2020. (*Id.* at 33.) During a March 17, 2020 briefing at OMDC, Smith and her coworkers expressed concerns about how long rags could be used before they should be washed, and Smith's coworkers requested gloves and disinfectant wipes to help combat the virus. (*Id.*) At the direction of her doctor Smith took another leave of absence on March 17, 2020, that was expected to end on March 31, 2020. (*Id.*) Smith decided to resign on March 31, 2020 and did so that same day. (*Id.* at 34.)

Following Smith's resignation she spoke with the assistant warden at OMDC who asked Smith to delay her decision to resign "because it would all blow over in a month." (*Id.* at 35.) Smith never returned to work at OMDC but was aware that the OMDC human resources manager attempted to reach out to her to discuss extending Smith's leave of absence. (*Id.*) Smith testified that she did not attempt to determine what measures had been taken at OMDC to address COVID-19 since she began leave and she did not know when Defendant began allowing employees at OMDC to wear masks. (*Id.* at 34–35.)

C. Gregory Arnold

Defendant Gregory Arnold started working as a Detention Officer at OMDC on November 13, 2018. (*Id.* at 26.) Arnold lives with his asthmatic son. (*Id.*) On March 30,

2020, Arnold sent an email to the OMDC warden suggesting that all OMDC staff wear protective gloves and masks given that PPE recommendations might change and that there was a rapidly-spreading outbreak at a facility in New York. (*Id.* at 27.) The warden responded the same day explaining that OMDC was following CDC guidelines. (*Id.*)

On April 1, 2020, Arnold's request to wear a facemask while working that day was denied because he was not required to work with COVID-positive, COVID-positive-suspected, or high-risk detainees. (*Id.* at 28.) Arnold believed that his family was considered high-risk and testified that he refused to work if he could not wear a mask. (*Id.*) Defendant offered Arnold a Family and Medical Leave Act ("FMLA") leave of absence, but he refused. (*Id.*) Arnold was then told that he was "not willing to go to post" which he believed was a terminable offense. (*Id.* at 28–29.)

Arnold went on FMLA leave beginning April 1, 2020. (*Id.* at 29.) Arnold testified that the only reason he did not work on April 1 was because he was told that he could not wear a mask, and that he would have worked if he was allowed to wear one. (*Id.*) He initially requested FMLA leave for the period of April 7, 2020, to May 1, 2020, which was approved and then extended through May 15, 2020. (*Id.*) Arnold resigned on May 19, 2020. (*Id.* at 30.) He did not consider resigning until the end of April 2020 and was unaware at the time of his resignation of whether Defendant was allowing employees at OMDC to wear masks. (*Id.* at 31.)

D. Erica Brooks

Defendant Erica Brooks began working at OMDC on August 20, 2018, in the position of Master Scheduler but began working as a Detention Officer about one year later. (*Id.* at 21.) On March 30, 2020, Brooks began FMLA leave. (*Id.* at 22.) Brooks's leave was approved for the period of March 30, 2020, to May 12, 2020. (*Id.*) In a March 30, 2020 email from Brooks to OMDC's human resources manager, Brooks described an incident where she was told she was not allowed to wear a face mask while guarding a detainee with suspected tuberculosis despite being advised to wear a mask by a nurse. (*Id.* at 23.) Brooks resigned on May 12, 2020. (*Id.*) Brooks did not think about resigning

before May 2020 and was not present at OMDC any time between when her leave began and when she resigned. (*Id.* at 25.) Brooks was unaware that all employees were allowed to wear facemasks at OMDC beginning April 3, 2020. (*Id.* at 26.)

III. LEGAL STANDARD

A. Summary Judgment

Summary judgment is appropriate where the record, taken in the light most favorable to the nonmoving party, demonstrates that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). A "material" fact is one "that might affect the outcome of the case," and an issue of material fact is "genuine" if "a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248.

"A moving party without the ultimate burden of persuasion at trial . . . has both the initial burden of production and the ultimate burden of persuasion on a motion for summary judgment." *Nissan Fire & Marine Ins. Co. v. Fritz Companies, Inc.*, 210 F.3d 1099, 1102 (9th Cir. 2000). The moving party can carry its burden of production by either (1) presenting evidence that negates an essential element of the nonmoving party's case, or (2) by showing that the nonmoving party does not have enough evidence of an essential element to carry its ultimate burden of persuasion at trial. *Id.* If the moving party fails to discharge this initial burden, the nonmoving party may defeat summary judgment without producing anything. *Id.* at 1102–03.

If, however, the moving party meets their initial burden, the nonmoving party cannot defeat summary judgment merely by demonstrating "that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986); *see also Triton Energy Corp. v. Square D Co.*, 68 F.3d 1216, 1221 (9th Cir. 1995) ("The mere existence of a scintilla of evidence in support of the non-moving party's position is not sufficient."). Rather, the nonmoving party must "go beyond the pleadings"

and designate "specific facts showing that there is a genuine issue for trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986) (quoting Fed. R. Civ. P. 56(e)).

"[T]he district court may limit its review to the documents submitted for the purpose of summary judgment and those parts of the record specifically referenced therein." *Carmen v. San Francisco Unified Sch. Dist.*, 237 F.3d 1026, 1030 (9th Cir. 2001). The Court is not obligated "to scour the record in search of a genuine issue of triable fact." *Keenan v. Allan*, 91 F.3d 12705, 1279 (9th Cir. 1996) (quoting *Richards v. Combined Ins. Co. of Am.*, 55 F.3d 247, 251 (7th Cir. 1995)).

B. Constructive Termination

"Constructive discharge occurs when the employer's conduct effectively forces an employee to resign." *Turner v. Anheuser-Busch, Inc.*, 876 P.2d 1022, 1025 (Cal. 1994). "[A]n employee must plead and prove . . . that the employer either intentionally created or knowingly permitted working conditions that were so intolerable or aggravated at the time of the employee's resignation that a reasonable employer would realize that a reasonable person in the employee's position would be compelled to resign." *Id.* at 1029. To amount to constructive discharge, working conditions must be "unusually 'aggravated' or amount to a 'continuous pattern.'" *Id.* at 1027.[3]

"[A]n employee cannot simply 'quit and sue,' claiming he or she was constructively discharged. The conditions giving rise to the resignation must be sufficiently extraordinary and egregious to overcome the normal motivation of a competent, diligent, and reasonable employee to remain on the job to earn a livelihood." *Turner*, 876 P.2d at 1026. The determination of whether conditions were so intolerable to justify a reasonable employee's decision to resign is normally a factual question for the jury. *Watson v. Nationwide Ins. Co.*, 823 F.2d 360, 361 (9th Cir. 1987). "[H]owever, summary judgment against an

[3] California law also requires the employee to prove that the dismissal violated a public policy. *Turner*, 876 P.2d at 1032–33. Defendant only challenges Plaintiffs' ability to show constructive termination, (ECF No. 45-1, at 31), thus the Court need not address the public policy element.

employee on a constructive discharge claim is appropriate when, under the undisputed facts, the decision to resign was unreasonable as a matter of law." *Scotch v. Art Inst. of California*, 93 Cal. Rptr. 3d 338, 368 (Ct. App. 2009). "The proper focus is on whether the resignation was coerced, not whether it was simply one rational option for the employee." *Turner*, 876 P.2d at 1026.

IV. DISCUSSION

As an initial matter, Plaintiffs argue that they were forced to take leave due to insufficient safety measures taken at OMDC, and therefore they were constructively discharged at the time they went on leave. (ECF No. 48, at 29–30.) But the law has long required that an employee claiming constructive discharge establish intolerable working conditions *at the time of the employee's resignation*. *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1465 (9th Cir. 1994); *Montero v. AGCO Corp.*, 192 F.3d 856, 861 (9th Cir. 1999); *King v. AC & R Advert.*, 65 F.3d 764, 767 (9th Cir. 1995); *Turner*, 876 P.2d at 1029; *Garamendi v. Golden Eagle Ins. Co.*, 27 Cal. Rptr. 3d 239, 254 (Ct. App. 2005).

While the court recognizes that a leave of absence may give rise to a claim for constructive discharge in lieu of a resignation, here each Plaintiff actually resigned and there is no evidence that Plaintiffs intended to "*permanently* 'leave' [their] employment" at the time they each took leave. *Sanchez v. Loews Hotels Holding Corp.*, No. 19-cv-02084-W-MDD, 2021 WL 424288, at *5 (S.D. Cal. Feb. 8, 2021) (emphasis added). None of the Plaintiffs contemplated resigning until very near to or on the date they resigned. Accordingly, the Court looks to evidence of intolerable conditions at the time Plaintiffs resigned, not when Plaintiffs went on leave. [4]

Defendant argues *inter alia* that because Plaintiffs were not working and had no knowledge of the COVID protocols Defendant had in place at the time of their resignations,

[4] It follows that any factual disputes raised by Plaintiffs' evidence concerning the conditions before the times Plaintiffs resigned are immaterial.

Plaintiffs cannot possibly establish that they were subject to intolerable working conditions at the time they resigned. (ECF No. 45-1, at 36.)

Plaintiffs respond that Defendant's repeated lack of safety measures in light of an ongoing global pandemic and repeated refusal to ensure the problems were corrected renders the working conditions unusually adverse. (ECF No. 48, at 32.) Plaintiffs argue specifically that Defendant refused to take any additional sanitation precautions or provide adequate sanitation supplies. (*Id.* at 32–33.) Additionally, Plaintiffs assert that Defendant "doubled-down" on prohibiting masks for Plaintiffs, despite their known underlying health conditions. (*Id.* at 34.) This fact, coupled with Defendant's repeated indifference to the risk of transmission, renders the circumstances unusually adverse according to Plaintiffs. (*Id.*)

Plaintiffs add that OMDC has dealt with outbreaks in the past, and Defendant continuously failed to take affirmative steps to minimize a potential outbreak. (*Id.* at 34–35.) Plaintiffs contend that Defendants did not take steps to ensure all precautions were actually implemented such as failing to designate any individual to ensure increased sanitation processes were in place after repeated employee complaints. (*Id.* at 35.) These issues occurred prior to the onset of the COVID-19 pandemic and were exacerbated by its onset, Plaintiffs argue. (*Id.*)

The Court finds that Defendants met their initial burden by showing that Plaintiffs lack sufficient evidence to prove they were subject to intolerable conditions at the time they resigned. *See Fairbank v. Wunderman Cato Johnson*, 212 F.3d 528, 532 (9th Cir. 2000) ("Under the federal standard a moving defendant may shift the burden of producing evidence to the nonmoving plaintiff merely by 'showing'—that is, pointing out through argument—the absence of evidence to support plaintiff's claim."). The burden then shifts to Plaintiffs to demonstrate a genuine dispute of material fact.

To start, Plaintiffs do not provide any evidence of the working conditions at OMDC in May of 2020, when Brooks and Arnold resigned. In fact, the only evidence of the working conditions after April 1, 2020, the last day that any of the Plaintiffs worked at

OMDC, is set forth by Defendant. Such evidence shows that Defendant continued to take additional safety measures in April of 2020, namely requiring its staff to wear masks. (*See* ECF No. 49-1, at 16.) Without presenting any evidence of the actual working conditions at OMDC in May 2020, Arnold and Brooks cannot meet their burden to overcome summary judgment. *Bias v. Moynihan*, 508 F.3d 1212, 1218 (9th Cir. 2007) ("To avoid summary judgment, [the plaintiff] was required to present significant probative evidence tending to support her allegations." (quotations omitted)).

The Court also finds that the evidence to which Plaintiffs cite is insufficient to create a dispute of a material fact as to whether the working conditions were intolerable when Smith resigned on March 31, 2020. For example, Plaintiffs cite to over fifty pages of OMDC shift activity reports to support their assertion that Defendants "refused to take all reasonable measures to ensure the [safety] problems were corrected." (*See* ECF No. 48, at 32.) The shift reports show that between March 20, 2020, and March 30, 2020, OMDC started requiring staff to submit to temperature checks; limiting meals to only one pod in the chow hall at a time and encouraging only three people per table; questioning staff at the entry about possible COVID symptoms and exposure; requiring PPE for visitors, officers working in pods of vulnerable populations, and screening staff; and putting in place social distancing and sanitization procedures. (ECF No. 46-5, at 39, 44, 45, 49, 50.) The shift reports do not suggest a lack of action, but instead do the opposite by showing that Defendant progressively adopted additional safety measures. Plaintiffs cite to these shift reports on multiple occasions to support their various arguments that Defendant was aware of a high risk and failed to take the appropriate measures, but do not explain how this evidence supports their arguments. (*See* ECF No. 48, at 33, 35.)

Plaintiffs also cite to over ninety pages of meeting minutes from Defendant's Coronavirus Committee to demonstrate that Defendant created special precautions to protect high-risk detainees but failed to do the same for staff, and that facility leaders needed to communicate the COVID-19 policies better. (*Id.* at 33, 35.) The meeting minutes echo the shift reports in detailing Defendant's ongoing efforts to ramp up their

safety policies. Between March 24, 2020, and March 31, 2020, the committee discussed implementing staff screening; signage pertaining to COVID practices; social distancing; PPE requirements when interacting with confirmed or suspected COVID patients; and sanitation procedures. (*See* ECF No. 46-6, at 16–17, 21, 22, 23, 28, 29, 39.)

Plaintiffs' efforts to use evidence in the record to prove a negative, i.e. a lack of safety measures, fall short of creating a genuine dispute of material fact. The shift reports and meeting minutes do not provide affirmative evidence of intolerable conditions at the time Plaintiffs resigned. To be sure, any evidence that only shows which policies were put in place but do not illustrate the actual working conditions are insufficient to raise a genuine dispute of material fact. (*See, e.g.*, ECF No. 48, at 19.)

Plaintiffs provide scant evidence of the working conditions at the time of Smith's resignation including Arnold's testimony that he saw screening staff not wearing the full PPE on March 31, 2020, and testimony from Brooks and Arnold that they were in close proximity to their coworkers during that time. (*See* ECF No. 49-1, at 15; ECF No. 46-4, at 71; *id.* at 90.) Plaintiffs also cite elsewhere to Arnold and Brooks's declarations and Brooks's deposition transcript in which they state that the check-in kiosks were not regularly cleaned. (ECF No. 46-4, at 73; *id.* at 90; ECF No. 46-3, at 160.) A reasonable jury could not return a verdict for Plaintiffs based on these facts alone and thus a genuine dispute of material fact does not exist. *Triton Energy Corp.*, 68 F.3d at 1221 ("[S]ummary judgment should be granted where the nonmoving party fails to offer evidence from which a reasonable jury could return a verdict in its favor.").

In sum, whether the safety measures mentioned were actually implemented or enforced could give rise to a genuine dispute of material fact, but Plaintiffs do not point to any evidence suggesting that Defendant's actions did not align with its stated policies. Plaintiffs have failed to demonstrate a genuine dispute as to whether the working conditions at OMDC were intolerable at the time of their resignations due to Defendant's COVID policies or lack thereof. *See Steiner*, 25 F.3d at 1465–66 (affirming grant of summary judgment in defendant's favor on constructive discharge claim where defendant company

took steps to remedy conditions before the plaintiff eventually resigned months later); *Montero*, 192 F.3d at 861 (holding the same).[5]

Further, Plaintiffs assert that Defendant cannot escape liability by claiming that it followed CDC recommendations. (ECF No. 48, at 23–27.) Failure to follow CDC guidelines by itself cannot render the working conditions intolerable. *Cf. Turner*, 876 P.2d at 1032 ("The mere existence of illegal conduct in a workplace does not, without more, render employment conditions intolerable to a reasonable employee."). Plaintiffs have failed to raise a genuine dispute of material fact as to intolerable conditions otherwise. Thus, assuming arguendo that Defendant did not comply with CDC recommendations, Plaintiffs cannot overcome summary judgment because they failed to raise a genuine dispute of material fact.[6]

Plaintiffs also argue that even if Defendant implemented safety guidelines, they were implemented too late. (ECF No. 48, at 26.) Plaintiffs claim that Defendant failed to timely social distance briefing sessions, the intake unit, and the chow hall as well as provide recommended PPE to intake personnel. (*Id.*) Additionally, Plaintiffs assert Defendant did not ensure adequate sanitation which included failing to disinfect the control center equipment and check-in kiosks until after discovering the OMDC's first COVID-positive staff member. (*Id.*)

The evidence Plaintiffs cite to in support of their timeliness contention suffers from the same deficiencies previously noted by the Court. Plaintiffs rely on evidence that confirms the dates Defendant put in place certain safety measures such as the shift activity reports discussed above, (ECF No. 46-5, at 1–53; ECF No. 45-3, at 231; ECF No. 45-11, at 77), an email from Defendant's vice president concerning best practices for social

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[5] While *Steiner* and *Montero* involve harassment claims under Title VII, both cases employ the same standard for constructive discharge applicable here. *See Steiner*, 25 F.3d at 1465; *Montero*, 192 F.3d at 861.

[6] Plaintiffs' arguments concerning the length of time they were subject to the alleged intolerable conditions and whether Defendant knowingly permitted such conditions to exist are immaterial for the same reason. (*See* ECF No. 48, at 36–41.)

distancing wardens and assistant wardens, (ECF No. 46-7, at 13), and an email discussing the implementation of PPE requirements for screening staff on March 27, 2020, (ECF No. 45-12, at 155). This evidence does nothing more than contribute to the factual timeline of Defendant's COVID policies and does not demonstrate to the Court why such policies were untimely.

The only evidence that Plaintiffs cite to that alludes to a timeliness issue is the deposition transcript of OMDC's warden in which he acknowledges receiving an email of an unspecified date advising him that he "should" take certain measures laid out in a "Coronavirus prevention plan." (ECF No. 46-2, at 75.) This evidence is plainly insufficient to raise a genuine dispute of material fact as to the timing of Defendant's COVID response. Notably absent is any indication of when the email was sent, whether the warden implemented the recommendations and if so, when they were implemented, and what made the circumstances untimely. Plaintiffs are again unable to carry their burden to avoid summary judgment.

V. CONCLUSION

For the foregoing reasons, the Court finds that Plaintiffs failed to raise a genuine dispute of material fact with respect to whether their working conditions were sufficiently intolerable to constitute constructive discharge, and Defendant is therefore entitled to judgment as a matter of law. Accordingly, Defendant's motion for summary judgment is **GRANTED**. **The clerk is instructed to enter judgment in Defendant's favor and close the above-captioned actions**.

IT IS SO ORDERED.

Dated: May 4, 2023

Applicant Details

First Name	**Kirk**
Middle Initial	**E**
Last Name	**MacKinnon Morrow**
Citizenship Status	**U. S. Citizen**
Email Address	**kem345@georgetown.edu**
Address	**Address** Street **1443 W. Minnehaha Parkway** City **Minneapolis** State/Territory **Minnesota** Zip **55419**
Contact Phone Number	**(952) 457-3015**

Applicant Education

BA/BS From	**Northwestern University**
Date of BA/BS	**June 2012**
JD/LLB From	**Georgetown University Law Center** **https://www.nalplawschools.org/employer_profile?FormID=961**
Date of JD/LLB	**May 22, 2022**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Georgetown Law Journal**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Jessup International Law Moot Court**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Lenhardt, Robin
ral25@georgetown.edu
202-662-9612

Wherry, Jessica
jessica.wherry@law.georgetown.edu
443-889-6140

DeRosa, Mary
mbd58@law.georgetown.edu
202-841-2415

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Kirk E. MacKinnon Morrow
1013 Valley Road, Apt. B
Charleston, WV 25302

June 27, 2023

The Honorable Morgan Christen
United States Court of Appeals for the Ninth Circuit
Old Federal Building
605 West Fourth Avenue, Suite 252
Anchorage, Alaska 99501-2248

Dear Judge Christen:

I write to apply for a one-year clerkship to begin in either June or August 2025. I am currently clerking for Judge John T. Copenhaver, Jr. of the Southern District of West Virginia, having joined his chambers shortly after graduating from Georgetown Law in May 2022. I have found this to be a tremendously enriching first step in my legal career and hope to gain further federal appellate experience.

While clerking for Judge Copenhaver, I have been especially drawn to assignments that had an appellate character. Of these, I am particularly proud of two complex orders on motions for reconsideration of summary judgment that I researched and drafted regarding a sprawling, decade-long False Claims Act suit. I enjoy this kind of work not only because it necessitates thinking carefully about procedural and substantive law, but also because I believe error correction is fundamentally important within our system of justice. I am eager to further develop my appellate skills at the state level next term by clerking for Justice Natalie Hudson of the Minnesota Supreme Court, and I would be delighted to continue doing so at the federal level as your clerk.

Additionally, my district court clerkship has helped me refine my judicial writing and sharpen my knowledge of federal practice and procedure. The substance of my work has touched on all manner of civil and criminal law, including administrative review, trial practice, prison litigation, and several novel questions of federal constitutional law. Judge Copenhaver welcomes the opportunity to speak to my qualifications and can be contacted at (304) 347-3146.

At Georgetown, I was an Articles Editor on the Georgetown Law Journal and legal intern at the U.S. Department of Justice, Office of Foreign Litigation. I was also an oralist in the Jessup International Law moot court competition, student attorney in the Housing Advocacy and Litigation Clinic, and faculty research assistant for a project on cultural heritage law. These experiences drew on my work prior to law school in community programming for Minnesota's state humanities council, where I cultivated deep professional relationships with diverse constituencies and organizations. I would bring these same values and commitment to hard work to your chambers.

Please find enclosed my resume, transcript, and writing sample. I have arranged for letters of recommendation to be sent under separate cover. My recommenders are:

Mary DeRosa
Professor from Practice;
Co-Director, Global Law Scholars Program
mbd58@georgetown.edu
(202) 661-6541

Robin Lenhardt
Professor of Law
ral25@georgetown.edu
(202) 662-9612

Jessica Wherry
Professor of Law, Legal Practice
jessica.wherry@law.georgetown.edu
(202) 662-9528

Please let me know if I can provide any further information. Thank you for your consideration.

Respectfully,

Kirk E. MacKinnon Morrow

KIRK E. MACKINNON MORROW

1013 Valley Road, Apt. B, Charleston, WV 25302
(952) 457-3015 • kem345@georgetown.edu
Admitted to practice in Minnesota

EDUCATION

GEORGETOWN UNIVERSITY LAW CENTER, J.D. *cum laude*, May 2022

GPA:	3.76/4.0
Honors:	Dean's List (2L, 3L); CALI Award (State-to-State Dispute Resolution)
Journal:	*Georgetown Law Journal*, Articles Editor
Activities:	Barristers' Council, Appellate Advocacy Division (Jessup International Law Moot Court)
	Global Law Scholars
	OutLaw (LGBT student organization)
	Rising for Justice: Housing Litigation and Advocacy Clinic
Employment:	Research Assistant to Prof. J. Peter Byrne (International Cultural Heritage Law)
	Teaching Assistant to Prof. Joost Pauwelyn (International Trade Law)

UNIVERSITY OF TORONTO, M.A. in Comparative Literature, 2013

Activities:	*Transverse Literary Journal*, Editorial Board Member

NORTHWESTERN UNIVERSITY, B.A. *cum laude* in Comparative Literature, Minor in German, 2012

Study Abroad:	Università del Salento, Lecce, Italy (2010–11)

EXPERIENCE

MINNESOTA SUPREME COURT, Saint Paul, MN
Judicial Law Clerk to Hon. Natalie E. Hudson (future) August 2023–July 2024

U.S. DISTRICT COURT, SOUTHERN DISTRICT OF WEST VIRGINIA, Charleston, WV
Judicial Law Clerk to Hon. John T. Copenhaver Jr. August 2022–August 2023

- Manage one third of court's full civil docket, addressing motions and disputes at all phases of litigation
- Research and draft orders on complex civil matters involving the False Claims Act; Section 1983; Title VII; Class Action Fairness Act; First, Second, Fourth, and Fourteenth Amendments; and federal and state common law
- Assist with a criminal jury trial, as well as complex criminal post-trial motions and petitions for habeas corpus
- Work closely with judge and communicate regularly with counsel and court personnel

U.S. DEPARTMENT OF JUSTICE, OFFICE OF FOREIGN LITIGATION, Washington, DC
Law Clerk January 2022–April 2022

- Researched and analyzed complex international law issues and draft memoranda related to current OFL cases
- Conducted legal and factual research on international judicial assistance matters under 28 U.S.C. § 1782

DORSEY & WHITNEY LLP, Minneapolis, MN
Summer Associate (offer received) May–July 2021

- Prepared research summaries and memoranda analyzing various civil matters, including intellectual property law in Minnesota, police misconduct in Louisiana, and insurer liability in California under state Unfair Competition Law
- Drafted response to USPTO refusal to register client trademark, successfully obtaining withdrawal of agency refusal
- Published article on firm's acclaimed TheTMCA blog analyzing a landmark EU trademark law decision

MINNESOTA HUMANITIES CENTER, Saint Paul, MN
Program Officer May 2016–July 2019

- Wrote successful grant proposals, securing over $500,000 from foundations and government funders
- Researched and designed six major direct service and grantmaking initiatives; presented and moderated frequently

Program Associate July 2015–April 2016
Program Assistant January 2015–July 2015

AMERICAN RELIEF AGENCY FOR THE HORN OF AFRICA, Minneapolis, MN
Grant Writer December 2014–July 2015

LICEO SCIENTIFICO LEONARDO DA VINCI, Gallarate, Italy
English Language Teaching Assistant October 2013–May 2014

Record of: Kirk E. MacKinnon Morrow
GUID: 835892460

Course Level: Juris Doctor

Degrees Awarded:
Juris Doctor Jun 08, 2022
Georgetown University Law Center
Major: Law/Global Law Scholars
Honors: Cum Laude

Entering Program:
Georgetown University Law Center
Juris Doctor
Major: Law/Global Law Scholars

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2019							
LAWJ	001	92	Civil Procedure Naomi Mezey	4.00	B+	13.32	
LAWJ	002	92	Contracts Girardeau Spann	4.00	B	12.00	
LAWJ	005	23	Legal Practice: Writing and Analysis Jessica Wherry	2.00	IP	0.00	
LAWJ	008	22	Torts Mary DeRosa	4.00	B	12.00	

	EHrs	QHrs	QPts	GPA
Current	12.00	12.00	37.32	3.11
Cumulative	12.00	12.00	37.32	3.11

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2020							
LAWJ	003	22	Criminal Justice Shon Hopwood	4.00	P	0.00	
LAWJ	004	92	Constitutional Law I: The Federal System Yvonne Tew	3.00	P	0.00	
LAWJ	005	23	Legal Practice: Writing and Analysis Jessica Wherry	4.00	P	0.00	
LAWJ	007	22	Property K-Sue Park	4.00	P	0.00	
LAWJ	235	50	International Law I: Introduction to International Law David Koplow	3.00	P	0.00	
LAWJ	611	18	Internet Defamation Simulation: Alternative Dispute Resolution in a Transnational Dispute Julia Ross	1.00	P	0.00	

Mandatory P/F for Spring 2020 due to COVID19

	EHrs	QHrs	QPts	GPA
Current	19.00	0.00	0.00	0.00
Annual	29.00	12.00	37.32	3.11
Cumulative	31.00	12.00	37.32	3.11

----------Continued on Next Column----------

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2020							
LAWJ	1468	05	Business and Financial Basics for Lawyers Andrew Blair-Stanek	2.00	P	0.00	
LAWJ	165	07	Evidence Gerald Fisher	4.00	A-	14.68	
LAWJ	1663	05	The Federal Courts and the World Seminar: History, Developments, and Problems Kevin Arlyck	2.00	A	8.00	
LAWJ	1721	08	Transnational Law Colloquium John Byrne	1.00	P	0.00	
LAWJ	195	05	Election Law: Voting, Campaigning and the Law Paul Smith	3.00	A	12.00	
LAWJ	244	08	International Trade Law Joost Pauwelyn	3.00	A	12.00	
LAWJ	661	05	Global Law Scholars Seminar I: Building an International Skill Set David Stewart	1.00	P	0.00	

Dean's List Fall 2020

	EHrs	QHrs	QPts	GPA
Current	16.00	12.00	46.68	3.89
Cumulative	47.00	24.00	84.00	3.50

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2021							
LAWJ	1010	05	International Law in Domestic Courts Seminar David Stewart	3.00	A	12.00	
LAWJ	1349	08	Administrative Law Lisa Heinzerling	3.00	A	12.00	
LAWJ	215	09	Constitutional Law II: Individual Rights and Liberties Robin Lenhardt	4.00	A	16.00	
LAWJ	361	97	Professional Responsibility Deepika Ravi	2.00	A	8.00	
LAWJ	462	08	EU Law: Selected Topics in ECJ Jurisprudence Franz Werro	1.00	P	0.00	
LAWJ	662	05	Global Law Scholars Seminar II: Building an International Skill Set David Stewart	1.00	P	0.00	

Dean's List Spring 2021

	EHrs	QHrs	QPts	GPA
Current	14.00	12.00	48.00	4.00
Annual	30.00	24.00	94.68	3.95
Cumulative	61.00	36.00	132.00	3.67

----------Continued on Next Page----------

This is not an official transcript. Courses which are in progress may also be included on this transcript.

Record of: Kirk E. MacKinnon Morrow
GUID: 835892460

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
---------- Fall 2021 ----------							
LAWJ	213	05	Federal Indian Law	2.00	A-	7.34	
			Nathaniel Amdur-Clark				
LAWJ	3136	12	State-to-State Dispute Resolution	2.00	A	8.00	
			David Bigge				
LAWJ	421	09	Federal Income Taxation	4.00	A	16.00	
			Dorothy Brown				
LAWJ	552	05	Housing Advocacy Litigation Clinic at Rising for Justice, Law Students in Court Division		NG		
			Paul diBlasi				
LAWJ	552	80	~Seminar	2.00	A	8.00	
			Paul diBlasi				
LAWJ	552	81	~Casework	3.00	A	12.00	
			Paul diBlasi				
LAWJ	552	82	~Professionalism	2.00	A	8.00	
			Paul diBlasi				

	EHrs	**QHrs**	**QPts**	**GPA**
Current	15.00	15.00	59.34	3.96
Cumulative	76.00	51.00	191.34	3.75

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
---------- Spring 2022 ----------							
LAWJ	1491	107	~Seminar	1.00	A	4.00	
			Adrianne Clarke				
LAWJ	1491	109	~Fieldwork 3cr	3.00	P	0.00	
			Adrianne Clarke				
LAWJ	1491	35	Externship I Seminar (J.D. Externship Program)		NG		
			Adrianne Clarke				
LAWJ	1620	05	Campaigning for Public Office	2.00	A	8.00	
			Zakiya Thomas				
LAWJ	178	09	Federal Courts and the Federal System	3.00	A-	11.01	
			Paul Smith				
LAWJ	487	08	EU Tax Law	1.00	P	0.00	
			Alexander Rust				
Dean's List 2021-2022							

---------- Transcript Totals ----------

	EHrs	**QHrs**	**QPts**	**GPA**
Current	10.00	6.00	23.01	3.84
Annual	25.00	21.00	82.35	3.92
Cumulative	86.00	57.00	214.35	3.76

---------- End of Juris Doctor Record ----------

Northwestern University
633 Clark Street
Evanston, IL 60208
United States

Name: Morrow,Kirk Edward Mackinnon
Student ID: 2509527

Official Undergraduate Transcript

Print Date: 02/14/2020

Degrees Awarded

Degree: Bachelor of Arts
Confer Date: 06/15/2012
Degree Honors: Cum Laude
Plan: Comparative Literary Studies Major
Plan: German Minor

Test Credits

Test Credits Applied Toward School of Journalism

2008 Fall

Course		Description	Attempted	Earned	Grade	Points
ENGLISH	1LT	English Literature Credit	1.000	1.000	T	0.000
ENGLISH	1LT	English Literature Credit	1.000	1.000	T	0.000
HISTORY	2US	US History Credit	1.000	1.000	T	0.000
HISTORY	2US	US History Credit	1.000	1.000	T	0.000
Test Trans GPA:	0.000	Transfer Totals:	4.000	4.000		0.000

Beginning of Undergraduate Record

2008 Fall (09/23/2008- 12/12/2008)

Program: School of Journalism
Plan: Journalism Major

Course		Description	Attempted	Earned	Grade	Points
ASTRON	120-0	Highlights Astr	1.000	1.000	B	3.000
ECON	201-0	Intro Macroecon	1.000	1.000	B-	2.700
GERMAN	205-1	Focus Writing: Faces of Berlin	1.000	1.000	A	4.000
GERMAN	224-0	Introduction to Contmp Germany	1.000	1.000	A	4.000
Course Topic:		Majr German Cities after 1945				

			Attempted	Earned	GPA Units	Points
Term GPA	3.425	Term Totals	4.000	4.000	4.000	13.700
Transfer Term GPA		Transfer Totals	4.000	4.000	0.000	0.000
Combined GPA	3.425	Comb Totals	8.000	8.000	4.000	13.700

2009 Winter (01/05/2009- 03/20/2009)

Program: School of Journalism
Plan: Journalism Major

Course		Description	Attempted	Earned	Grade	Points
ENGLISH	210-1	Engl Lit Tradit	1.000	1.000	A-	3.700
GERMAN	203-1	Focus Speaking: Ger/Am Images	1.000	1.000	A	4.000
Course Topic:		Current German-American Images				
HISTORY	201-2	European Civilizatn since 1750	1.000	1.000	B+	3.300
JOUR	201-1	Reporting & Writing	1.000	1.000	B+	3.300
SLAVIC	261-0	Polish Culture in the 20th C	1.000	1.000	A-	3.700

			Attempted	Earned	GPA Units	Points
Term GPA	3.600	Term Totals	5.000	5.000	5.000	18.000

2009 Spring (03/30/2009- 06/12/2009)

Program: School of Journalism
Plan: Journalism Major

Course		Description	Attempted	Earned	Grade	Points
GERMAN	221-2	Intro to German Lit: 1900-1945	1.000	1.000	A	4.000
LING	222-0	Language, Politics, & Identity	1.000	1.000	A-	3.700
POLI_SCI	359-0	Politics in Africa	1.000	1.000	B+	3.300

			Attempted	Earned	GPA Units	Points
Term GPA	3.667	Term Totals	3.000	3.000	3.000	11.000

2009 Fall (09/22/2009- 12/11/2009)

Program: Weinberg College of Arts & Sci
Plan: Comparative Literary Studies Major
Plan: German Major

Course		Description	Attempted	Earned	Grade	Points
COMP_LIT	211-0	Topics in Genre	1.000	1.000	A	4.000
Course Topic:		What is Lyric Poetry?				
GERMAN	333-0	Post-War to Post-Wall GDR Lit	1.000	1.000	B	3.000
ITALIAN	133-1	Inten Ital	1.000	1.000	A	4.000
ITALIAN	134-1	Inten Ital	1.000	1.000	A	4.000
LING	260-0	Words & Sentences	1.000	1.000	A-	3.700

			Attempted	Earned	GPA Units	Points
Term GPA	3.740	Term Totals	5.000	5.000	5.000	18.700

2010 Winter (01/04/2010- 03/19/2010)

Program: Weinberg College of Arts & Sci
Plan: Comparative Literary Studies Major
Plan: German Major

Course		Description	Attempted	Earned	Grade	Points
COMP_LIT	211-0	Topics in Genre	1.000	1.000	A	4.000
Course Topic:		Introduction to the Novel				
ENGLISH	377-0	Topics in Latina/o Literature	1.000	1.000	A-	3.700
Course Topic:		Chicanas & Chicanos at War				
ITALIAN	133-2	Inten Italian	1.000	1.000	A	4.000
ITALIAN	134-2	Intensive Italian	1.000	1.000	A	4.000
JWSH_ST	350-0	Rep the Holocst	1.000	1.000	A	4.000
MATH	110-0	Intro to Mathematics I	1.000	1.000	B+	3.300

Northwestern University
633 Clark Street
Evanston, IL 60208
United States

Name: Morrow,Kirk Edward Mackinnon
Student ID: 2509527

Official Undergraduate Transcript

		Attempted	Earned	GPA Units	Points
Term GPA	3.833 Term Totals	6.000	6.000	6.000	23.000

2010 Spring (03/29/2010- 06/11/2010)

Program: Weinberg College of Arts & Sci
Plan: Comparative Literary Studies Major
Plan: German Major

Course		Description	Attempted	Earned	Grade	Points
ENGLISH	365-0	Postcolonial Lit	1.000	1.000	A	4.000
Course Topic:		Art & Autobiography				
GERMAN	345-0	Topics in Lit. & Cult.	1.000	1.000	B+	3.300
Course Topic:		Shat World:Rep&Mean afterShoah				
ITALIAN	133-3	Inten Italian	1.000	1.000	A	4.000
ITALIAN	134-3	Inten Italian	1.000	1.000	A	4.000

		Attempted	Earned	GPA Units	Points
Term GPA	3.825 Term Totals	4.000	4.000	4.000	15.300

2010 Fall (09/21/2010- 12/10/2010)

Program: Weinberg College of Arts & Sci
Plan: Comparative Literary Studies Major
Plan: German Major

Transfer Credit from ITALY/UNIVERSITA DEL SALENTO
Applied Toward Weinberg College of Arts & Sci Program

Course		Description	Attempted	Earned	Grade	Points
GEN_CRED	1XX	Gen Credit 1XX	1.000	1.000	T	0.000
GEN_CRED	1XX	Gen Credit 1XX	1.000	1.000	T	0.000
GEN_CRED	1XX	Gen Credit 1XX	1.000	1.000	T	0.000
ITALIAN	3XX	Italian 3XX	1.000	1.000	T	0.000

Course		Description	Attempted	Earned	Grade	Points
GEN_LA	354-0	St Abrd Affiliated	0.000	0.000		0.000
ITALY/UNIVERSITA DEL SALENTO						

			Attempted	Earned	GPA Units	Points
Term GPA	0.000	Term Totals	0.000	0.000	0.000	0.000
Transfer Term GPA		Transfer Totals	4.000	4.000	0.000	0.000
Combined GPA	0.000	Comb Totals	4.000	4.000	0.000	0.000

2011 Winter (01/03/2011- 03/18/2011)

Program: Weinberg College of Arts & Sci
Plan: Comparative Literary Studies Major
Plan: German Major

Transfer Credit from ITALY/UNIVERSITA DEL SALENTO
Applied Toward Weinberg College of Arts & Sci Program

Course		Description	Attempted	Earned	Grade	Points
BIOL_SCI	1XX	Biol Sci 1XX	1.000	1.000	T	0.000
GEN_CRED	1XX	Gen Credit 1XX	1.000	1.000	T	0.000
GEN_CRED	1XX	Gen Credit 1XX	1.000	1.000	T	0.000
GEN_CRED	1XX	Gen Credit 1XX	1.000	1.000	T	0.000

Course		Description	Attempted	Earned	Grade	Points
GEN_LA	354-0	St Abrd Affiliated	0.000	0.000		0.000
ITALY/UNIVERSITA DEL SALENTO						

			Attempted	Earned	GPA Units	Points
Term GPA	0.000	Term Totals	0.000	0.000	0.000	0.000
Transfer Term GPA		Transfer Totals	4.000	4.000	0.000	0.000
Combined GPA	0.000	Comb Totals	4.000	4.000	0.000	0.000

2011 Spring (03/28/2011- 06/10/2011)

Program: Weinberg College of Arts & Sci
Plan: Comparative Literary Studies Major
Plan: German Major

Transfer Credit from ITALY/UNIVERSITA DEL SALENTO
Applied Toward Weinberg College of Arts & Sci Program

Course		Description	Attempted	Earned	Grade	Points
GEN_CRED	1XX	Gen Credit 1XX	1.000	1.000	T	0.000
GEN_CRED	1XX	Gen Credit 1XX	1.000	1.000	T	0.000
GEN_CRED	1XX	Gen Credit 1XX	1.000	1.000	T	0.000
PHIL	269-0	Bioethics	1.000	1.000	T	0.000

Course		Description	Attempted	Earned	Grade	Points
GEN_LA	354-0	St Abrd Affiliated	0.000	0.000		0.000
ITALY/UNIVERSITA DEL SALENTO						

			Attempted	Earned	GPA Units	Points
Term GPA	0.000	Term Totals	0.000	0.000	0.000	0.000
Transfer Term GPA		Transfer Totals	4.000	4.000	0.000	0.000
Combined GPA	0.000	Comb Totals	4.000	4.000	0.000	0.000

2011 Fall (09/20/2011- 12/09/2011)

Program: Weinberg College of Arts & Sci
Plan: Comparative Literary Studies Major
Plan: German Major

Course		Description	Attempted	Earned	Grade	Points
COMP_LIT	312-0	Authors and Their Readers	1.000	1.000	A-	3.700
Course Topic:		Jorge Luis Borges				
COMP_LIT	398-0	Senior Seminar	1.000	1.000	A	4.000
GERMAN	303-0	Speaking as Discovery: Explori	1.000	1.000	A-	3.700
Course Topic:		Advanced Conversation				
ITALIAN	348-0	The Italian Novella	1.000	1.000	A	4.000
Course Topic:		Modern Italian Short Story				
SLAVIC	108-1	Elementary Polish	1.000	1.000	A	4.000

		Attempted	Earned	GPA Units	Points
Term GPA	3.880 Term Totals	5.000	5.000	5.000	19.400

Northwestern University
633 Clark Street
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Name: Morrow,Kirk Edward Mackinnon
Student ID: 2509527

Official Undergraduate Transcript

2012 Winter (01/03/2012- 03/16/2012)

Program: Weinberg College of Arts & Sci
Plan: Comparative Literary Studies Major
Plan: German Minor

Course		Description	Attempted	Earned	Grade	Points
COMP_LIT	311-0	Th & Practice:Poetry Translatn	1.000	1.000	A	4.000
COMP_LIT	390-0	Topics in Comparative Lit	1.000	1.000	A	4.000
Course Topic:		Italian Culture and Literature				
GERMAN	211-0	German Culture through Film	1.000	1.000	A	4.000
SLAVIC	108-2	Elementary Polish	1.000	1.000	A	4.000

			Attempted	Earned	GPA Units	Points
Term GPA	4.000	Term Totals	4.000	4.000	4.000	16.000

2012 Spring (03/26/2012- 06/08/2012)

Program: Weinberg College of Arts & Sci
Plan: Comparative Literary Studies Major
Plan: German Minor

Course		Description	Attempted	Earned	Grade	Points
COMP_LIT	399-0	Indep Study	1.000	1.000	A	4.000
GERMAN	307-0	Current Events and Issues in G	1.000	1.000	A	4.000
SLAVIC	108-3	Intro Polish	1.000	1.000	A	4.000

			Attempted	Earned	GPA Units	Points
Term GPA	4.000	Term Totals	3.000	3.000	3.000	12.000

Term Honor: Departmental Honors - Comparative Literary Studies

Undergraduate Career Totals						
Cum GPA	3.772	Cum Totals	39.000	39.000	39.000	147.100
Transfer Cum GPA		Transfer Totals	16.000	16.000	0.000	0.000
Combined Cum GPA	3.772	Comb Totals	55.000	55.000	39.000	147.100

End of Official Undergraduate Transcript

NORTHWESTERN UNIVERSITY

Evanston, Illinois

ACCREDITATION

Northwestern University is accredited by the Higher Learning Commission (www.hlcommission.org). Other professional, college, school, and departmental accreditations are listed here:
http://www.registrar.northwestern.edu/academic_records/index.html
Northwestern University's CEEB code is 001739.

OFFICE OF RECORD

The Office of the Registrar, 633 Clark Street, Evanston, Illinois 60208, (847) 491-5234, fax: (847) 491-8458, www.registrar.northwestern.edu, issues transcripts of records for the following schools in the University. Such transcripts are a complete and chronological listing of all courses attempted in any of the schools listed.

Bienen School of Music	Kellogg School of Management
Dental School (closed 2001)	School of Communication (formerly Speech)
The Graduate School	School of Education and Social Policy
McCormick School of Engineering and Applied Science	Weinberg College of Arts and Sciences
	Medill School of Journalism, Media, Integrated Marketing Communications
Graduate Nursing School (closed 1990)	
Physician Assistant Program	Prosthetics-Orthotics (Master's program only)

The Office of the Dean/Director of each school/program listed below issues transcripts of records for these units. These transcripts must be requested separately and in addition to any transcripts from other Northwestern schools.

Northwestern Pritzker School of Law (312) 503-8464, www.law.northwestern.edu
Northwestern University in Qatar 974-4454-5072, www.qatar.northwestern.edu
Feinberg School of Medicine (312) 503-1369 www.feinberg.northwestern.edu
School of Professional Studies (312) 503-6950 www.sps.northwestern.edu
Physical Therapy (312) 908-8160 www.feinberg.northwestern.edu/sites/pthms/
Prosthetics-Orthotics (certificates) (312) 503-5700 www.nupoc.northwestern.edu/

ACADEMIC CALENDARS

Northwestern University offers programs on numerous calendars. Unless listed specifically below, the calendar on this transcript is a quarter system consisting of three quarters lasting approximately 10 weeks and one summer session lasting 10-11 weeks. Terms may include shorter sessions. The Executive MBA Program through the Kellogg School of Management is an exception with class meetings on designated weekends during terms corresponding to the quarter calendar.

Northwestern University in Qatar operates on a traditional semester calendar consisting of two terms each lasting 16 weeks and one summer term.

The Physician Assistant Program operates on a trimester calendar consisting of three terms each lasting 16 weeks.

The Physical Therapy Program operates on a semester calendar consisting of three terms each lasting 16 weeks.

The Prosthetics-Orthotics master's program uses a course unit system in which a 1 in the earned and attempted column = 1-unit course. For the purpose of transfer credit, one unit should be considered to be the equivalent of four quarter hours or 2 2/3 semester hours.

CREDIT

For quarter-based programs, in September 1969 NU began using a course unit system in which a 1 in the earned and attempted column = 1-unit course. For the purpose of transfer credit, one unit should be considered to be the equivalent of **four quarter hours or 2 2/3 semester hours.**

Prior to 2006 the Summer Session was based on a semester system and credits taken in that context should be considered to be the equivalent of four quarter hours or three semester hours.
For an explanation of credits earned in quarter-based programs prior to 1969: http://www.registrar.northwestern.edu/academic_records/index.html

The Physician Assistant program uses a trimester hour credit measure in which each credit hour corresponds to an hour of meeting time for each week of a 16-week trimester.

The Physical Therapy program uses a semester hour credit measure in which each credit hour corresponds to an hour of meeting time for each week of a 16-week semester.

The Prosthetics-Orthotics master's program uses a course unit system in which a 1 in the earned and attempted column = 1 course. For the purpose of transfer credit, one course should be considered to be the equivalent of four quarter hours or 2 2/3 semester hours.

Northwestern University in Qatar uses a course unit system in which a 1 in the earned and attempted column = 1-unit course. For the purposes of transfer credit, one unit should be considered to be the equivalent of four semester hours.

GRADE POINT AVERAGE (GPA)

All courses attempted are recorded on the transcript and used in the GPA calculation. GPA is computed by taking the total grade points divided by the attempted units. NR, T, TR, P, N, K, S, U, and W grades are not included in GPA calculations.

Northwestern University does not calculate major GPAs nor does it rank its students.

EXPLANATION OF GRADE POINTS AND GRADES

For grade categories and years not represented below visit: www.registrar.northwestern.edu/academic_records/index.html

Note: GPAs are not calculated on official graduate and professional transcripts.

ABC GRADING SCALE

Grade Points	Grade	Description
4.0	A	Excellent
3.7	A-	
3.3	B+	
3.0	B	Good
2.7	B-	
2.3	C+	
2.0	C	Satisfactory
1.7	C-	
1.0	D	Poor but passing
0.0	F	Fail
0.0	X	Missed final exam
0.0	Y	Work incomplete

BY SCHOOL, WHEN THE GRADE RUBRIC ABOVE IS APPLICABLE

Undergraduate Programs	September 1982 - present
Bienen School of Music (graduate programs)	January 2005 – present
School of Communication (graduate programs)	September 2005 - present
School of Education and Social Policy (graduate programs – D grade not used)	March 2005 - present
The Graduate School (D grade not used)	September 2004 - present
Medill School of Journalism, Media, Integrated Marketing Communications (graduate programs – D grade not used)	October 1986 - present
McCormick School of Engineering and Applied Science (graduate programs)	September 1996 - present

GRADE POINTS AND GRADES USED BY KELLOGG SCHOOL OF MANAGEMENT (non-executive MBA Programs)

Grade Points	Grade	Description
4.0	A	Excellent
3.0	B	Good
2.0	C	Satisfactory
1.0	D	Poor but passing
0.0	F	Fail
0.0	X	Missed final exam
0.0	Y	Work incomplete

TRANSCRIPT NOTATIONS AND ABBREVIATIONS CURRENTLY IN USE

HP	High Pass
K	Indicates work in progress*
LP	Low Pass
N	No grade, no credit*
NR	No grade Reported by Instructor
P	Pass with credit*
S	Satisfactory (non-credit course)
T	Transfer grade* (Spring Quarter 1969-70, full academic credit)
TR	Transfer grade* (Qatar Campus)
U	Unsatisfactory (non-credit course)
V	Visitor (auditor)
W	Withdrew - with permission
X	Absent from final examination**
Y	Incomplete - Additional work required**
*	Not included in either the quarterly or the cumulative grade point average
**	Carries zero grade points and included in calculation of GPA. Both the quarterly and cumulative GPA are changed if a final grade is reported

TRANSCRIPT SYMBOLS

°	Grades received by special report
#	Duplication
##	Not applicable toward degree

For transcript notations and symbols not described here: http://www.registrar.northwestern.edu/academic_records/index.html

DEGREES AWARDED

For a complete list of degrees awarded:
www.registrar.northwestern.edu/academic_records/index.html

TRANSFER CREDIT

Undergraduate records document articulated transfer credit by listing the institution of record and a T grade for each approved course. Grades for work transferred from another institution are not recorded. If such grades are needed the student must request a transcript directly from the awarding institution.

STATUS

Students should be regarded as in good academic standing unless otherwise noted. Each unit devises a probation/suspension/withdrawal policy, as well as academic eligibility to re-enroll after an absence.

COURSE NUMBERING SYSTEM

A/100 level	Courses primarily for freshmen and sophomores, usually without college prerequisite.
B/200 level	Courses primarily for sophomores and juniors, usually with the prerequisite of an A/100 level course in the same or a related department.
C/300 level	Courses primarily for upperclassmen and graduates, often with the prerequisites of an A/100 and/or B/200 level course in the same or a related department.
D/400 level	Courses or seminars primarily for graduates, in which the major part of the work is not research.
E/500 level	Courses for graduates only; seminars in which the work is primarily research, or special research by the individual student under faculty direction.

COURSE SUBJECTS AND DESCRIPTIONS

For more details: www.northwestern.edu/caesar/

This Transcript Key was last updated in September 2016.

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 27, 2023

The Honorable Morgan Christen
Old Federal Building
605 West Fourth Avenue, Suite 252
Anchorage, AK 99501-2248

Dear Judge Christen:

I write to express my enthusiastic support of Kirk MacKinnon Morrow's application for a judicial clerkship. I do so with great enthusiasm and without reservation. In my view, Kirk would be an asset to any judicial chambers.

From January to May 2021, I had the pleasure of having Kirk in my 2021 Constitutional Law II class. That course, one of the most difficult offered in our curriculum, builds on the basic overview of constitutional structures and powers under the U.S. Constitution. It considers the scope of individual, civil, and political rights. In doing so, the course places special emphasis on the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment, and the First Amendment. Kirk was not a student enamored with the sound of his own voice. He chose his interventions carefully, always managing to have a positive impact on the class discussion and the hard questions we explored over the course of the semester. In so doing, Kirk encouraged his classmates to think in new ways about the issues we discussed. Even more, he made himself a regular during office hours at a time when the difficulties of Covid-19 and online education led many students to not to come to office hours at all.

Notably, Kirk's first-year grades were not as robust as those that led him to a 3.75 average. I hope that you will not give undue weight to grades when evaluating Kirk as a candidate. Like many students during the early days of Covid-19, he worked to find his academic footing under unusually trying times. More important, I think, are the strides that Kirk has made since then.

In the time he has been at Georgetown, Kirk has taken on roles and had experiences that set him apart from many of his peers. For example, Kirk now serves as the Articles Editor for the celebrated Georgetown Law Journal, a prestigious position that has allowed him to have an impact on legal scholarship during his tenure. Notwithstanding the many obligations he has, Kirk has also devoted significant time and energy to other organizations, such as the Barristers' Council Appellate Advocacy team, where he enjoyed team and individual success; serving as a research assistant for a faculty member; working with Georgetown Housing Litigation and Advocacy Clinic; and being an active member of the school's Outlaw chapter. In sum, Kirk is a young person with boundless energy and a desire to be part of organizations and efforts that make a difference, as the humanitarian work he did before law school underscores. Importantly, I have no doubt that Kirk would bring the same level of energy and enthusiasm he has shown as a law student to his work with you in chambers.

Kirk MacKinnon Morrow is a young person of great character, intellect, willingness to work, and devotion to the law that sets him apart from his peers. As a former U.S. Supreme Court law clerk to Justice Stephen Breyer, I know very well the pressures under which law clerks must operate and I believe that Kirk can meet that challenge and more. All he needs is an opportunity. And I hope very much that you give it to him.

If it would be helpful to you, please feel free to contact at me at (973) 508-7087. It would be my pressure to discuss this promising young lawyer this

Yours sincerely,

Robin A. Lenhardt
Professor of Law &
Co-Founder and Co-Director,
Racial Justice Institute,
Georgetown University

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 27, 2023

The Honorable Morgan Christen
Old Federal Building
605 West Fourth Avenue, Suite 252
Anchorage, AK 99501-2248

Dear Judge Christen:

Without reservation, I wholeheartedly recommend Kirk MacKinnon Morrow for a clerkship in your chambers. Kirk was a student in my Legal Practice: Writing and Analysis course at Georgetown Law during the 2019-2020 academic year. Through class and office hours, I came to know Kirk well and am delighted to support his application for a clerkship.

Since our time together in class, Kirk has stayed in touch with me, and I have enjoyed learning of his various academic and employment achievements. He also volunteered his time to meet (via Zoom) with some of my new students during the fall 2020 semester to help them navigate the transition to law school. Most recently, I have appreciated hearing from Kirk about his experience clerking for Judge John T. Copenhaver in the Southern District of West Virginia.

Consistent with his exceptional academic work as a law student and his deep commitment to developing as a strong legal writer, Kirk's capacity for learning and applying legal principles was reflected by his work product for my Legal Practice course. Kirk's work product stood out as strong from the very first writing assignment, and over the course of the year, he consistently demonstrated growth and a keen ability to respond to feedback as he worked to develop his legal research and writing skills. I know that law school was an adjustment for Kirk, as it is for many law students. His adjustment has certainly been successful as demonstrated by his spectacular academic achievement during his second year of law school, earning a 3.89 in the fall 2020 semester and a 4.00 in the spring 2021 semester. To top it off, he graduated cum laude.

Over the course of the year in my course, Kirk's work was consistently at the top of the class of 55 students. For example, he demonstrated his mastery of objective legal analysis in writing the fall exam. The exam required him to research a new issue of state law and write an objective memo based on a fictional client's facts. His exam earned a hypothetical A, hypothetical because the Legal Practice course grade is assigned only at the end of the second semester. In fact, Kirk's exam was the highest-scoring exam for the fall semester scoring 28 out of 30 points!

For the spring 2020 semester, Georgetown Law moved to mandatory P/F rather than letter grades, and the grade of "P" Kirk earned in my course does not adequately reflect his coursework. Given the move to online learning in the spring semester, Kirk's transcript will never reflect the high-quality legal analysis and writing he produced during the year. I have every reason to believe that Kirk would have produced a strong exam brief had he been given the opportunity to earn a grade during the spring semester. His spectacular multi-year successes in the Jessup International Law Moot Court competition reflect this expectation.

Kirk's experience between college and law school sets him apart from other law students and from other clerkship candidates. In his work experience running public programs for the humanities council in Minnesota, he interacted with people throughout the state and collaborated closely with cultural organizations and community groups. This work covered a wide variety of issues, from veteran reintegration to Somali youth storytelling. Given this experience, Kirk carries with him the importance of holding space for complexity and human stories. As a law clerk, he would bring that sensitivity to provide respect, care, and attention to the litigants while working within required procedures and deadlines.

Based on Kirk's consistently high-quality work product and my sense of his professionalism and ability to interact well with others, I encouraged him to apply for a position as a Law Fellow (teaching assistant) to the Legal Research and Writing Program. I would have jumped at the opportunity to have Kirk as one of my Law Fellows this year! Despite my encouragement and support for his candidacy, Kirk did not apply for the Law Fellow Program. Of course, I understood that he had other academic goals and completely respect his decision not to apply. Kirk maximized his law school experience by participating in the Housing Advocacy and Litigation Clinic and externing as a Law Clerk in the DOJ Office of Foreign Litigation. He would bring this litigator's perspective to your chambers.

Kirk is an ideal candidate to join your chambers because of his commitment to legal research and writing and his genuine desire to fully engage in the judicial process. Kirk would also bring a depth of clerking experience to chambers given his current clerkship with Judge Copenhaver and his forthcoming clerkship with Justice Natalie Hudson of the Minnesota Supreme Court for the 2023–24 term.

Kirk is a diligent worker; he is high-functioning and gets the job done. He is humble and has a keen sense of humor. He takes care to understand expectations and then exceed them. He would thrive in chambers, seeking every opportunity to develop professionally as a legal researcher and writer, as well as to cultivate a mentoring relationship with you to develop a deeper understanding of the practical aspects of litigation and effective lawyering. Please do not hesitate to contact me if there is any additional information I can provide. I can be reached at 443-889-6140 (cell) or jessica.wherry@law.georgetown.edu.

Jessica Wherry - jessica.wherry@law.georgetown.edu - 443-889-6140

Very best wishes,

Jessica Lynn Wherry
Professor of Law, Legal Practice

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 27, 2023

The Honorable Morgan Christen
Old Federal Building
605 West Fourth Avenue, Suite 252
Anchorage, AK 99501-2248

Dear Judge Christen:

I understand Kirk MacKinnon Morrow has applied for a clerkship in your chambers. I have known Kirk since his first days as a law student. He has always impressed me with his intellect, his skill as a writer, and his humanity. He has my highest possible recommendation.

I am most familiar with Kirk through the Global Law Scholars (GLS) program at Georgetown law, which I co-direct. GLS is a small, selective program for Georgetown law students interested in international, national security, or transnational careers. GLS participants must have a background that includes international experience and proficiency in a second language (Kirk is fluent in Italian and also speaks French and German). The GLS students meet regularly in their first year for discussions on international and national security law, leadership, and negotiation skills. The second year is an academic seminar for which they produce a major group product on a transnational or international law issue. Kirk's group chose the topic "Overcoming Legal Barriers to Climate Change Solutions." Kirk was a research leader for the project, managing and editing input from other students, in addition to contributing his own work. The group completed a significant research paper and have promoted their work publicly through a series of blog posts and podcasts. Kirk has been a leader of and key contributor to his GLS group.

I was also Kirk's torts professor in the fall of 2019. He was one of my favorite students in the class. He always offered intelligent comments and excellent hypotheticals. It was clear that he had a thorough understanding of the material. Unfortunately, Kirk's grade on the exam did not fully reflect this understanding. He was the type of student we see on occasion who need time to adjust to the law school exam style. His excellent grades through the remainder of law school are reflective of the first-rate student I saw in class.

Kirk stands out for his excellent writing. He is a beautiful writer who makes his points clearly and directly, while telling a good story. His writing skill resulted in his selection for the Georgetown Law Journal, where served as Articles Editor. Kirk received the "Georgetown Law Journal Meritorious Service Award."

In addition to his skills as a student, I have gotten to know Kirk through many conversations and am always impressed by his kindness and generosity. The great respect he enjoys from his peers is further evidence of these traits. Kirk would be an excellent judicial clerk and I know you would enjoy having him in your chambers. Please let me know if I can provide any additional information.

Sincerely,

Mary B. DeRosa
Professor from Practice
Georgetown Law
mbd58@georgetown.edu
202-841-2415

Kirk E. MacKinnon Morrow

1013 Valley Road, Apt. B, Charleston, WV 25302
(952) 457-3015 • kem345@georgetown.edu

Writing Sample

The enclosed writing sample is a draft memorandum opinion and order denying a motion to dismiss, which I completed in February 2023 during my clerkship with the Hon. John T. Copenhaver, Jr. of the United States District Court for the Southern District of West Virginia. This writing sample is the preliminary draft that I provided for Judge Copenhaver's consideration based on my independent research and analysis of the parties' briefing. The discussion section of this writing sample is entirely my own work product and was completed prior to receipt of any input, consultation, or edits from the judge or anyone else. A small portion of the factual background section of this opinion relating to events in another proceeding was drafted by a prior law clerk, and the section setting forth the legal standard reflects language that Judge Copenhaver uses regularly in orders addressing motions to dismiss.

Substantively, this order addresses whether a former inmate bringing a claim against prison officials under 42 U.S.C. § 1983 for conduct occurring during his incarceration must exhaust administrative remedies pursuant to the Prison Litigation Reform Act, where his claims for the same conduct, brought in a prior civil action during his incarceration, were dismissed without prejudice for failure to exhaust administrative remedies. This order concludes that he need not.

Judge Copenhaver largely adopted my draft opinion in his final memorandum opinion and order. He has given me permission to use this as a writing sample. I have changed the parties' names and other identifying information.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

ANTHONY TABUCCHI,

Plaintiff,

v. Civil Action No. 2:22-00XXX

CORRECTIONAL OFFICER HAL LAXNESS
and LT. CARLOS FUENTES,

Defendants.

MEMORANDUM OPINION AND ORDER

Pending is a motion to dismiss (ECF No. 6), filed July 11, 2022 by defendant Correctional Officers Laxness and Fuentes.

I. Background

A. The first civil action

On December 13, 2018, the plaintiff, Anthony Tabucchi ("Tabucchi"), filed a *pro se* complaint with the Clerk of this court alleging violations under 42 U.S.C. § 1983, thereby initiating Civil Action No. 2:18-XXXX.[1] At the time of filing, Tabucchi was an inmate at the Mount Olive Correctional Complex. *See* Pl.'s Complaint Envelope, ECF No. 2-1. As defendants in that matter,

[1] ECF citations in this subsection refer to the docket in *Tabucchi v. Laxness et al.*, No. 2:18-cv-XXXX (S.D. W. Va.).

Tabucchi named Correctional Officers Hal Laxness ("Laxness"), David Chung ("Chung"), and Lt. Carlos Fuentes ("Fuentes"), as well as Dr. Norman Frye ("Frye"). Compl., ECF No. 2.

In his complaint, Tabucchi alleged that Laxness, accompanied by Chung, sprayed him with "phantom (clear out)," a type of pepper spray, on February 27, 2017 "for no reason at all." Compl. at ¶ IV. Tabucchi claimed that contrary to the directions of medical staff, Laxness and Fuentes did not allow him to shower and wash off the pepper spray for three days after placing him back in the pod where the alleged assault occurred. *Id.* He claimed to have developed skin problems arising from the pepper spray and that defendant Frye refused to treat the problems. *Id.* In a subsequent filing, Tabucchi clarified that his claims against defendants were for alleged cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution. ECF No. 21 at 1.

On January 15, 2020, the court dismissed Frye and Chung from the civil action. ECF No. 32 at 3. Tabucchi subsequently obtained legal representation, and counsel entered an appearance on his behalf on March 26, 2020. ECF No. 33.

On December 8, 2020, the remaining defendants, Laxness and Fuentes, moved for summary judgment. Defs.' Mot. Summ. J., ECF No. 51. Laxness and Fuentes argued that dismissal was required under the Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997(e), because Tabucchi failed to exhaust his administrative remedies prior to filing suit. Mem. Supp. Defs.' Mot. Summ. J., ECF No. 52 at 6. Plaintiff contended that exhaustion was not required because administrative remedies were not available to him. Pl.'s Resp., ECF No. 55 at 3. Noting that Tabucchi bore the burden of establishing the unavailability of an administrative remedy and the absence of record evidence to that end, on April 26, 2021, the court granted summary judgment in favor of Laxness and Fuentes. Mem. Op., ECF No. 67 at 13, 16-17 (hereinafter "2021 Summary

Judgment Order"). The court entered a judgment order the same date, dismissing civil action 2:18-cv-XXXX without prejudice. ECF No. 68.

B. The present civil action

On January 25, 2022, Tabucchi was released from state custody. ECF No. 18 at ¶ 2.[2] On April 8, 2022, Tabucchi filed by counsel a complaint and thereby initiated the present civil action. Compl., ECF No. 1. This complaint relates to the same incident as the prior civil action, although Tabucchi's allegations include additional detail; the court briefly recites the facts as alleged in this civil action.

On February 27, 2017, Tabucchi was in his cell when a series of two verbal arguments broke out between him and defendant Laxness with respect to Tabucchi's legal mail. Compl. at ¶ 3. Between these arguments, Laxness stepped away before returning to Tabucchi's cell and spraying him with OC, a type of pepper spray. *Id.* at ¶ 5. Plaintiff alleges that at the time he was sprayed, he posed no threat and that Laxness stated an intent to make an example out of plaintiff. *Id.* Tabucchi was taken to the prison medical station, where he received partial decontamination from the pepper spray. *Id.* at ¶ 6. Plaintiff requested a shower to relieve an asserted chemical burning sensation, which the defendants refused him. *Id.* Tabucchi went more than one day without a shower, and he asserts that he suffered shortness of breath, burning of the skin, and severe emotional distress due to the defendants' use of OC spray and denial of complete and timely decontamination. *Id.* at ¶ 7.

[2] All ECF citations hereinafter refer to the docket in the present civil action, namely, *Tabucchi v. Laxness et al.*, 2:22-cv-XXX (S.D. W. Va.).

At the time of filing the complaint in the present civil action, Tabucchi was not in custody. *Id.* at ¶¶ 1, 8; ECF No. 18 at ¶¶ 2, 6. The defendants agree that the plaintiff was not incarcerated at the time the complaint was filed. *See* ECF No. 19 at ¶¶ 2-3.

II. Legal standard

Federal Rule of Civil Procedure 8(a)(2) requires that a pleader provide "a short and plain statement of the claim showing . . . entitle[ment] to relief." Fed. R. Civ. P. 8(a)(2); *Erickson v. Pardus*, 551 U.S. 89, 93 (2007). Rule 12(b)(6) correspondingly permits a defendant to challenge a complaint when it "fail[s] to state a claim upon which relief can be granted . . . ." Fed. R. Civ. P. 12(b)(6).

The required "short and plain statement" must provide "'fair notice of what the . . . claim is and the grounds upon which it rests.'" *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957), *overruled on other grounds*, *Twombly*, 550 U.S. at 563); *see also Anderson v. Sara Lee Corp.*, 508 F.3d 181, 188 (4th Cir. 2007). In order to survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570); *see also Monroe v. City of Charlottesville*, 579 F.3d 380, 386 (4th Cir. 2009).

Application of the Rule 12(b)(6) standard requires that the court "accept as true all of the factual allegations contained in the complaint . . . ." *Erickson*, 551 U.S. at 94; *see also South Carolina Dept. of Health & Env't Control v. Commerce and Indus. Ins. Co.*, 372 F.3d 245, 255 (4th Cir. 2004) (quoting *Franks v. Ross*, 313 F.3d 184, 192 (4th Cir. 2002)). The court must also "draw[] all reasonable factual inferences . . . in the plaintiff's favor[.]" *Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4th Cir. 1999).

III. Discussion

Defendants advance three arguments in support of their motion to dismiss. They contend that (1) plaintiff failed to exhaust his administrative remedies pursuant to the Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997(e); (2) collateral estoppel bars plaintiff from relitigating the issue of exhaustion; and (3) the West Virginia Savings Statute does not relieve plaintiff of his obligation to exhaust administrative remedies, entitling defendants to dismissal as a matter of law. Defs.' Mem. Supp. Mot., ECF No. 7 at 4-5.

In response, plaintiff argues that (1) he was not required to exhaust his administrative remedies under the PLRA because he was not incarcerated at the time the complaint was filed in this civil action, and (2) his complaint was timely filed according to the West Virginia Savings Statute. Pl.'s Resp., ECF No. 8 at 3-4.

The arguments advanced by the parties largely turn on a single question: must a former inmate bringing a Section 1983 claim against prison officials for conduct occurring during his incarceration exhaust administrative remedies pursuant to the PLRA, where his claims for the same conduct, brought in a prior civil action during his incarceration, were dismissed without prejudice for failure to exhaust administrative remedies.

The PLRA provides that "[n]o action shall be brought with respect to prison conditions . . . by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). "[F]ailure to exhaust is an affirmative defense under the PLRA." *Jones v. Bock*, 549 U.S. 199, 216 (2007). "[T]he burden of proof for the exhaustion of administrative remedies in a suit governed by the PLRA lies with the defendant." *Roberts v. Barreras*, 484 F.3d 1236, 1241 (10th Cir. 2007).

"[L]itigants . . . who file prison conditions actions after release from confinement are no longer 'prisoners' for purposes of § 1997e(a) and, therefore, need not satisfy the exhaustion requirements of this provision." *Greig v. Goord*, 169 F.3d 165, 167 (2d Cir. 1999) (per curiam); *see also Cofield v. Bowswer*, 247 F. App'x 413, 414 (4th Cir. 2007) (per curiam) (unpublished) (where a plaintiff was "not a prisoner when he filed his complaint, the PLRA exhaustion requirement is not applicable to his § 1983 action."); *Cantley v. W. Va. Reg'l Jail and Corr. Facility Auth.*, 728 F. Supp. 2d 803 (S.D. W. Va. 2010); *Smith v. Franklin Cnty.*, 227 F. Supp. 2d 667, 676 (E.D. Ky. 2002) (requiring former inmate to exhaust administrative remedies a "nonsensical" interpretation of PLRA).

To the extent of any inconsistency in the defendants' concessions on the matter,[3] the court notes that there can be little doubt that, with respect to the present civil action, Tabucchi is not subject to the exhaustion requirement of the PLRA when he was not incarcerated at the time he filed his complaint.[4] While it is true that in Tabucchi's prior civil action, brought while he was still in prison, the court considered the exhaustion issue at length and determined that Tabucchi had failed to exhaust his administrative remedies under the PLRA, it then dismissed the claims against Laxness and Fuentes without prejudice. *See* 2021 Summary Judgment Order at 17-18.

[3] *Compare* Defs.' Mem. Supp. at 4, 5; *with* Defs.' Mem. Supp. at 6; Defs.' Reply at 2.

[4] There is disagreement in the courts of appeal as to whether the applicability of the PLRA's requirements should be considered at the time the operative complaint is filed or the time a civil action is initiated. *See Wexford Health v. Garrett*, 140 S. Ct. 1611, 1611-12 (2020) (Thomas, J., dissenting from denial of certiorari) (identifying circuit split). *Compare Garrett v. Wexford Health*, 938 F.3d 69, 87 (3d Cir. 2019) (complaint); *Jackson v. Fong*, 870 F.3d 928, 937 (9th Cir. 2017) (complaint); *with Bargher v. White*, 928 F.3d 439, 447-48 (5th Cir. 2019) (civil action); *Harris v. Garner*, 216 F.3d 970, 981-82 (11th Cir. 2000) (en banc) (civil action). By unpublished opinion, the Fourth Circuit has opined that "it is the plaintiff's status at the time he filed the lawsuit that is determinative as to whether the § 1997e(a) exhaustion requirement applies." *Cofield*, 247 F. App'x at 414.

Inasmuch as the plaintiff's initial complaint is his operative complaint in this civil action, the court has no reason to address the issue, but notes it to situate its analysis of certain cases cited by the defendants.

As interpreted by the Supreme Court, Federal Rule of Civil Procedure 41(b) provides that "dismissals which are based on a plaintiff's failure to comply with a precondition requisite to the Court's going forward to determine the merits of his substantive claim" are to be dismissed without prejudice. *Costello v. United States*, 365 U.S. 265, 285 (1961) (broadly construing the "for lack of jurisdiction" exception in Fed. R. Civ. P. 41(b)). "The primary meaning of 'dismissal without prejudice' . . . is dismissal without barring the plaintiff from returning later, to the same court, with the same underlying claim" within the applicable limitations period. *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 505-06 (2001). In the PLRA context, the Fifth Circuit has explained, "[f]ailure to exhaust . . . warrants dismissal without prejudice, which permits the litigant to refile if he exhausts or is otherwise no longer barred by the PLRA requirements." *Bargher v. White*, 928 F.3d 439, 447 (5th Cir. 2019).

Notwithstanding the inapplicability of the PLRA and the court's dismissal of the prior civil action without prejudice, defendants contend that an inmate should not be permitted to, "once released from incarceration, revive an action previously barred by the inmate's failure to exhaust administrative remedies." Defs.' Mem. Supp. at 6.

Defendants support their position by citation to case law that is almost entirely inapposite to the posture of Tabucchi's case. Defendants cite statements from *Neal v. Goord*, 267 F.3d 116, 122 (2d Cir. 2001); *Jackson v. Dist. of Columbia*, 254 F.3d 262, 269 (D.C. Cir. 2001); and *Freeman v. Francis*, 196 F.3d 641, 645 (6th Cir. 1999), as standing for the proposition that a plaintiff cannot satisfy the PLRA exhaustion requirement during the pendency of a suit but must instead satisfy the exhaustion requirement prior to filing suit. This may be true enough, but it is of little moment to the present scenario where Tabucchi's previous case was dismissed without prejudice and he was subsequently released from incarceration prior to commencing this civil action.

Defendants also cite to *Ahmed v. Dragovich*, 297 F.3d 201 (3d Cir. 2002), for the proposition that subsequent release from incarceration does not relieve a plaintiff from the PLRA's exhaustion requirements. Defs.' Reply at 2. In addition to being substantially limited by the Third Circuit in *Garrett v. Wexford Health*, 938 F.3d 69, 85-87 (3d Cir. 2019), *Ahmed* is also of limited utility on the present facts. In *Ahmed*, the Third Circuit considered, entirely in dicta, whether a former inmate could amend his complaint in the same civil action after it had been dismissed without prejudice for failure to exhaust administrative remedies and judgment had been entered against him. Treating Ahmed's post-judgment Rule 15(a) motion to amend his complaint as a timely motion brought under Rule 60(b), the Third Circuit found the district court did not err in denying Ahmed's motion to amend the complaint to show that he had exhausted administrative remedies during the pendency of the suit. *Ahmed*, 297 F.3d at 208-10. This, of course, is substantially the same principle advanced by the other cases and of little relevance here in that Tabucchi's case concerns neither the satisfaction of the PLRA exhaustion requirement nor events within a single civil action.

To the extent that the Third Circuit's opinion in *Ahmed* is persuasive, however, it cuts against the position of the defendants. Briefly considering that, after the district court's denial of motion to amend, Ahmed was released from prison, the Third Circuit noted, again in dicta, that "[a]lthough Ahmed would have been free of the strictures of the PLRA if he had filed a timely complaint after his release from prison, he is bound by the PLRA because his suit was filed . . . before he was released from prison." *Id.* at 210. In any event, the court's attribution of persuasive authority to *Ahmed* is tempered by the Third Circuit's subsequent limitation of its application to the facts of a post-judgment attempt at amending a complaint. *See Garrett*, 938 F.3d at 86.

Here, the court's 2021 summary judgment order dismissed Tabucchi's prior civil action without prejudice on the basis of his failure to exhaust administrative remedies. That this dismissal

was without prejudice entitled Tabucchi to cure the deficiencies in his complaint and bring a new civil action. His release from custody so cured the deficiency in his complaint inasmuch as it freed him from the constraints of the PLRA, namely the administrative exhaustion requirement. *See Bargher*, 928 F.3d at 447. Despite vigorous debate on the ability of a former inmate to avoid the PLRA exhaustion requirement within the *same* suit by amending his complaint, the court can find no authority to support defendants' argument that would, in effect, treat a dismissal without prejudice for failure to exhaust administrative remedies under the PLRA as a dismissal with prejudice precluding a former inmate from later timely filing suit when he is no longer subject to the PLRA.

Because the PLRA's exhaustion requirement is to be applied without extra-statutory policy considerations, *see Ross v. Blake*, 578 U.S. 632, 648 (2016), the court is without power to, in effect, convert its prior dismissal without prejudice in the 2021 summary judgment order to a dismissal with prejudice by imposing the PLRA's administrative exhaustion requirement upon a former inmate in a timely-initiated, post-release civil action.

Finding the administrative exhaustion requirement inapplicable in this circumstance, the court need not consider defendants' argument that Tabucchi is collaterally estopped from arguing the issue of exhaustion.

Finally, having considered the PLRA exhaustion question, the only remaining question for the court is whether Tabucchi's claims were timely brought under the West Virginia Savings Statute. Cases brought under 42 U.S.C. § 1983 are subject to the statute of limitations for personal injuries of the state in which the alleged violations occurred. *DePaola v. Clarke*, 884 F.3d 481, 486 (4th Cir. 2018). For claims arising in West Virginia, West Virginia's two-year statute of limitations for personal injury actions applies. *Smith v. Travelpiece*, 31 F.4th 878, 883 (4th Cir. 2022) (citing W. Va. Code § 55-2-12(b)). However, West Virginia's Savings Statute provides that

> For a period of one year from the date of an order dismissing an action . . ., a party may refile the action if the initial pleading was timely filed and . . . [t]he action was involuntarily dismissed for any reason not based upon the merits of the action[.]

W. Va. Code § 55-2-18(a).

West Virginia's Savings Statute is a "highly remedial statute that should be liberally construed to allow a party who has filed a timely action to have their case decided on the merits." *Horne v. Lightning Energy Servs.*, 123 F. Supp. 3d 830, 838 (N.D. W. Va. 2015) (quoting *Cava v. Nat'l Union Fire Ins. Co.*, 753 S.E.2d 1, 8-9 (W. Va. 2013). In light of the statutory text and the remedial purpose thereof, Tabucchi's complaint in this civil action, filed April 8, 2022, or 347 days after the first civil action was dismissed without prejudice on April 26, 2021, plainly falls within the scope of the Savings Statute. While defendants point to the West Virginia Supreme Court of Appeals' holding that the Savings Statute will not apply where dismissal in the first action was procured by conduct equivalent to a voluntary act of the plaintiff, *McClung v. Tieche*, 29 S.E.2d 250, 252 (1944), the court sees little reason to conclude that Tabucchi's full and active participation in the prosecution of his case in the first civil action amounts to a constructive voluntary dismissal precluding application of the Savings Statute. The court therefore concludes that Tabucchi timely initiated this civil action under the West Virginia Savings Statute.

IV. Conclusion

For the foregoing reasons, it is ORDERED that the defendants' motion to dismiss (ECF No. 11) be, and hereby is, denied.

The Clerk is directed to transmit copies of this order to all counsel of record and any unrepresented parties.

ENTER:

Kirk E. MacKinnon Morrow

1013 Valley Road, Apt. B, Charleston, WV 25302
(952) 457-3015 • kem345@georgetown.edu

Writing Sample

The attached writing sample is an essay written for the course "State-to-State Dispute Resolution" taught by Prof. David Bigge at Georgetown Law in Fall 2021. For this paper, I was awarded the CALI Award for best paper in the course. This piece is my independent work product. All research, analysis, writing, and errors are my own.

This essay considers certain aspects of the International Court of Justice's approach to the admissibility of evidence in the context of international relations theory. It evaluates the significance of the Court's willingness to place conditions on the time and form of evidentiary submissions in contradistinction to its liberal approach to substantive admissibility. The essay concludes that the Court's differentiated approach reflects a strategic compromise between meeting States' expectations as litigants and maximizing the authority of the Court.

ADMISSIBILITY AS STRATEGIC CONSTRAINT IN THE EVIDENTIARY PRACTICE OF THE INTERNATIONAL COURT OF JUSTICE

Introduction

Since its foundation in the mid-twentieth century, the International Court of Justice has emerged as a sophisticated forum for the resolution of interstate disputes and an important source of procedural innovation and legal development for other international courts and tribunals. On matters such as standing,[1] necessary parties,[2] and ripeness,[3] the Court has contributed greatly to the corpus of international procedural law. While much of this progressive development of interstate procedural law has been rooted in customary international law, the Court also has a constituting Statute,[4] extensive Rules,[5] explanatory Practice Directions,[6] and a well-developed practice handbook published by the Court's Registrar.[7] Taken together, this network of law and rules provides litigants before the Court with considerable guidance about how a dispute may proceed.

In one area, however, the Court's practice remains much less cleanly developed. The Court's approach to evidence relies on a combination of fine-grained rules conditioning the technical aspects of evidentiary production and sweeping principles conditioning the more politically-sensitive questions of admissibility. This essay argues that this regime represents an exercise in maintaining the

[1] *E.g.,* Barcelona Traction Case (Belg. v. Spain), 1970 I.C.J. 3, ¶33 (Feb. 5); Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Senegal), 2012 I.C.J. 422, ¶68 (July 20).

[2] *Cf.* Monetary Gold (It. v. U.K.), 1954 I.C.J. 19, 32, 34 (June 15).

[3] Interhandel Case (Switz. v. U.S.), 1959 I.C.J. 6, 27 (Mar. 21), later codified at Article 14(2) of the Draft Articles on Diplomatic Protection.

[4] Statute of the International Court of Justice (1945), 33 U.N.T.S. 993 [hereinafter *ICJ Statute*].

[5] Rules of Court of the International Court of Justice, *I.C.J. Acts and Documents No. 7* (2021) [hereinafter *ICJ Rules of Court*].

[6] Practice Directions of the International Court of Justice [hereinafter *ICJ Practice Directions*].

[7] International Court of Justice, HANDBOOK (2018).

Court's "strategic space" through procedural diglossia, borrowing legitimacy and structure from an apparent evidentiary order while preserving space to admit deficient evidence and make a decision on the merits. Building upon the theoretical framework of international courts' "constrained independence" propounded by Lawrence Helfer and Anne-Marie Slaughter,[8] this essay suggests that the ICJ's approach to the admissibility of evidence functions to address two seemingly contradictory expectations of states seeking resolution of a dispute before the Court: clear *ex ante* procedural rules to guarantee due process on the one hand, and on the other hand, reassurance that evidentiary deficiencies will not preclude judicial settlement of an interstate dispute. In making this argument, the essay proceeds as follows: Part I provides a brief overview of the Court's approach to the admissibility of evidence, Part II surveys the Court's approach to common questions of admissibility, and Part III contextualizes this approach to admissibility as strategic space-making.

I. Evidence before the ICJ

The evidentiary practice of the ICJ has been the subject of surprisingly little formal dispute,[9] despite playing a key role in the Court's very first case.[10] As such, the Court has had few opportunities to expound upon the rather limited directives regarding the admissibility of evidence contained within its constituting Statute and adopted Rules of Court. But while the outer bounds of the Court's evidentiary powers are a matter of debate, there is general consensus that they are expansive and unlike those of a national court.[11] Indeed, the wording of Article 48 of the ICJ Statute suggests that this

[8] Helfer & Slaughter, *Why States Create International Tribunals*, 93 CALIF. L. REV. 899 (2005).

[9] Rosenne, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT OF JUSTICE, 1920–2005, at 1048 (2006).

[10] Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4, 17 (Apr. 9) [hereinafter *Corfu Channel*].

[11] *See* Rosenne *supra* note 9 at 557 ("the restrictions upon admissibility of evidence sometimes encountered in municipal procedure . . . have no place in international adjudication"); *cf.* Lauterpacht, *The So-Called Anglo-American and Continental Schools of Thought in International Law*, 12 BRITISH YEARBOOK INT'L L. 31, 41 (1931)

authority is plenary, providing that "the Court shall . . . make all arrangements connected with the taking of evidence."[12] A recent President of the Court has explained it to mean that "the Court does not operate on the basis of any preliminary evidentiary filter to weed out inadmissible evidence at the outset."[13]

This broad authority confounds traditional attempts at classification based on domestic analogy. While the generous approach to admissibility resembles some common law systems, the Court's treatment of the standard of proof and documentary evidence more closely resemble civil law systems.[14] The parties themselves play a significant role in presenting and developing evidence, and indeed one judge has suggested that the role of the Court is a "passive" one.[15] Other judges have advocated the Court take a more "proactive stance" toward the taking of evidence and finding of fact,[16] and the Court's Statute does authorize such latitude,[17] though this has seldom been the practice of the Court.[18] The prominent international law scholar and later judge of the ICJ James Crawford characterized the Court's approach to evidence as "adversarial in principle but libertarian in practice."[19]

(strict limits on admissibility of evidence in common law municipal systems are "not practicable to follow" in international law and have been "expressly repudiated.").

[12] *ICJ Statute* art. 48 ("the Court shall . . . make all arrangements connected with the taking of evidence").

[13] Tomka & Proulx, *The Evidentiary Practice of the World Court*, in LIBER AMICORUM, 369 (Sainz-Borgo, ed., 2017).

[14] Quintana, *Litigation at the International Court of Justice* 383 (2015).

[15] Western Sahara, Advisory Opinion, 1975 I.C.J. 127, 138 (Oct. 16) (Sep. Op. de Castro, J.) ("parties are masters of the evidence: the court has a passive role").

[16] Oil Platforms (Iran v. U.S.), 2003 I.C.J. 306, ¶47 (Nov. 6) (Sep. Op. Owada, J.).

[17] *ICJ Statute* art. 44(2) (power to make site visits); art. 48 (power to make orders for taking of evidence); art. 49 (power to request production of documents); art. 50 (power to call upon experts and establish commissions of inquiry).

[18] For example, the Court has only once conducted a site visit in the *Gabcikovo–Nagymoros Case* and has not exercised its Article 50 authority since its first case in *Corfu Channel*.

[19] Crawford & Pellet, *Anglo Saxon and Continental Approaches to Pleading Before the ICJ*, in Buffard, Crawford, Pellet, & Wittich (eds.), INTERNATIONAL LAW BETWEEN UNIVERSALISM AND FRAGMENTATION (2008) at 851.

II. Conditions of admissibility

The adversarial–libertarian tension at the heart of the Court's evidentiary regime raises the salience of admissibility questions, which the Court has addressed with an uneven set of conditions. The formality and clarity of these admissibility requirements vary greatly, however, and depend significantly on the issue at hand. While parties' evidentiary submissions must adhere to relatively clear rules as to their timing and form, the Court's rules as to the content of evidentiary submissions provide far less guidance. This Part first provides an overview of the Court's time and form rules on the admissibility of evidence before then addressing constraints the Court has or might place on the content of evidentiary submissions.

A. Time and Form of Submissions

Article 30(1) of the ICJ Statute empowers the Court to promulgate its own rules of procedure,[20] and the Court has exercised this rule-making authority in a limited way with respect to matters of admissibility to place certain limits on the timing and form of parties' evidentiary submissions. In particular, the Court restricts the late submission of evidence under Article 52 of the Statute and Article 56 of the Rules of Court.[21] The Court also places a quantitative constraint on the parties' evidentiary submissions, limiting the total number of pages of documentary evidence that may be submitted without extraordinary permission from the Court.[22] Finally, the Court prescribes specific requirements as to the format and filing procedure for documents being submitted into evidence.[23]

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[20] *ICJ Statute* art. 30(1).

[21] *Id.* art. 52; *ICJ Rules of Court* art. 56. *See also ICJ Practice Directions* IX (late submission of documentary evidence), IX*quater* (1) (late submission of audio-visual or photographic material).

[22] *Practice Direction* III.

[23] *Rules of Court* arts. 50, 52.

While these time–form rules do place limits that could conceivably impact the admissibility of evidence, they are largely technical limits with which parties retain great latitude to comply or petition the Court for exceptional treatment.

B. Content of Submissions

Far more delicate than time–form constraints on admissibility are constraints placed by the Court on the contents of items parties seek to submit as evidence. Although generally the Court addresses evidentiary deficiencies as a matter of appreciation rather than admissibility, it has previously entertained discrete content-based grounds for exclusion of evidence that merit further exploration. In the past, the ICJ or other international courts and tribunals have excluded evidence where its contents were either covered by some kind of legal privilege or where its contents were obtained in a manner that violated international law.

1. Privileged Information

The ICJ has appeared willing to accept limits on its ability to liberally admit evidence where a contrary rule of international law counsels in favor of exclusion, and nowhere is this impulse clearer than its approach to privileged information submitted into evidence. Indeed, the Court's predecessor first identified an exclusionary rule for certain information privileged by virtue of its being obtained during settlement negotiations in the 1927 *Chorzòw Factory* case. There the PCIJ held that it could not "take into account declarations, admissions, or proposals which the Parties may have made during direct negotiations between themselves, when such negotiations have not led to a complete

agreement."[24] The PCIJ twice reiterated this holding,[25] and the ICJ expanded upon its reasoning in the *Frontier Dispute (Burkina Faso v. Mali)* case.[26] In that case, the ICJ found that it could not admit into evidence a settlement agreement that the parties had negotiated but failed to subsequently approve because of the *Chorzòw Factory* exclusionary rule.[27]

The *Chorzòw Factory* rule comports with the Court's overarching concerns with preserving the equality of the parties and ensuring the proper exercise of its judicial function, but its limits remain undefined. While this line of cases appears to reflect a desire not to disincentivize the negotiated settlement of disputes, that logic could easily falter if the element of direct negotiation were interpreted too broadly, or conversely, if either the element of complete agreement or the element of declarations, admissions, or proposals were interpreted too narrowly. Particular challenges might arise in the event that an agreement's completeness is in dispute or the information obtained was not directly tied to the nature of the dispute being negotiated. As such, the *Chorzòw Factory* rule does provide an established ground for exclusion of evidence based on its content, but the Court's practice and decisions have added little clarity to the boundaries of the rule.[28]

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[24] Chorzòw Factory Case, 1927 P.C.I.J. Ser. A, No. 9 at 51.

[25] *See* Territorial Jurisdiction of the International Commission of the River Oder Case, 1929 P.C.I.J. Ser. A, No.23 at 42; Diversion of Water from the River Meuse, 1937 P.C.I.J. Ser. C, No. 81 at 220–24.

[26] Frontier Dispute (Burk. Faso v. Mali), 1986 I.C.J. 554, ¶147 (Dec. 22).

[27] *Id.*

[28] Nevertheless, states have attempted to codify and progressively develop the settlement negotiations privilege exclusionary rule in the area of international economic law. The United Nations Commission on International Trade Law has produced two iterations of a Model Law on International Commercial Mediation and International Settlement Agreements that provide greater clarity about the admissibility of settlement agreements and information obtained during negotiations into evidence. *See* UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements art. 11(1)(c) (2018). The General Assembly passed a resolution expressing support for the Model Law in 2018. UNGA Res. 73/199 (Dec. 20, 2018). Future developments in this area may prove illustrative in determining the scope of the *Chorzòw Factory* rule, although to-date states' adoption of the Model Law has been rather limited, with only 31 having implemented it since 2002.

Finally, the Court has indicated that the exclusion of privileged information might extend beyond the limited area of settlement negotiations. In *Questions Relating to the Seizure and Detention of Certain Documents and Data*, the Court issued an Order for Provisional Measures that recognized a state's "plausible right to the protections of its communications with counsel" that might render such communications inadmissible as evidence.[29] In that case, Timor Leste had brought a case against Australia before the Permanent Court of Arbitration after Australian spies surveilled a Timorese government office to gain information about ongoing treaty negotiations. After the PCA case was filed, Australia raided the offices of an attorney working on Timor Leste's PCA case and detained sensitive litigation documents; Timor Leste sought return of the documents by requesting the ICJ indicate provisional measures. Given the complex factual scenario of this case and the low "plausibility" standard required for provisional measures, there is reason to be circumspect about whether the Court's statements in the case evince a real step toward extending certain evidentiary safeguards for privileged materials. On the other hand, the underlying concerns of party equality and proper administration of justice that animate the Court's general approach to evidence would seem to support a finding that a version of attorney–client privilege does exist before the ICJ and establishes grounds for excluding evidence that violates it.

2. Illegally-Obtained Evidence

The ICJ has remained remarkably silent on the most contentious content-based question of admissibility: whether any exclusionary rule exists for evidence obtained in violation of international law. Early on, the Court had occasion in *Corfu Channel* to address the question of whether a state could violate international law in order to procure evidence for use in a proceeding before the ICJ.[30] The

[29] Timor Leste v. Aus., Provisional Measures, 2014 I.C.J. 147, ¶27 (Mar. 3).

[30] *Corfu Channel*, *supra* note 10.

United Kingdom had navigated through Albanian waters without the consent of Albania in order to conduct a minesweeping exercise, which it contended was justified by its need to procure evidence that would allow for judicial resolution of the dispute. The Court found that the U.K. had interfered with Albania's sovereignty in violation of international law,[31] but it did not take the subsequent step of addressing the admissibility of the evidence obtained as a result of that wrongful act. In fact, the Court's decision relied in part on evidence unlawfully obtained by the British minesweeping operation.[32] While the Court's silence in *Corfu Channel* on the question of admissibility may have derived from Albania's failure to challenge it,[33] scholars generally agree that it provides no basis for concluding that an exclusionary rule exists for illegally-obtained evidence at the ICJ.[34]

Since *Corfu Channel*, the Court has not had occasion to further address the admissibility of illegally-obtained evidence, but other international courts and tribunals point toward subsequent developments in this area of the law. Most notably, in the decades since *Corfu Channel*, courts and tribunals organized to hear issues of international criminal law (ICL) have developed a comparatively rich case law on the exclusion of wrongfully-obtained evidence. The constituting treaties or rules of procedure for such bodies typically include an express provision regarding the Court's treatment of wrongfully-obtained evidence.[35] These rules typically provide for two distinct exclusionary rules

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[31] *Id.* at 35.

[32] Mansour Fallah, *The Admissibility of Unlawfully Obtained Evidence before International Courts and Tribunals*, 19 L. & PRAC. OF INT'L CTS. AND TRIBUNALS 147, 156, n.50 (2020).

[33] *Id.* at 157.

[34] Chen, *Re-assessing the Evidentiary Regime of the International Court of Justice: A Case for Codifying its Discretion to Exclude Evidence*, 13 INT'L COMMENT. ON EVIDENCE 1, 17 (2015).

[35] *See, e.g.,* Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia, Rules 89(D), 95 [hereinafter *ICTY Rules*]; Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda, Rules 89(D), 95 [hereinafter *ICTR Rules*]; Rules of Procedure and Evidence of the Special Tribunal for Lebanon, Rules 149, 162(A) [hereinafter *STL Rules*]. *See also* Rome Statute of the International Criminal Court, art. 69(7) [hereinafter *Rome Statute*].

relevant here: the first is a discretionary ground for exclusion where an item of evidence's "probative value is substantially outweighed by the need to ensure a fair trial,"[36] and the second is a mandatory ground for exclusion where admission of the evidence would be antithetical to the integrity of the proceedings *and* seriously damages that procedural integrity.[37]

While these two types of exclusionary rules suggest that international law has developed with regard to the admissibility of illegally-obtained evidence, there are considerable caveats to its applicability in ICJ disputes. Most prominently, there is nothing within the Statute, Rules, or Practice Directions of the ICJ that makes express provision for how illegally-obtained evidence should be treated. This comes as little surprise – the penal interests and inherent inequality of the parties to an ICL dispute merit an enhanced level of evidentiary safeguards and judicial sanction of wrongdoing. On the other hand, the two ICL exclusionary rules map directly onto the two central principles of the Court's evidence jurisprudence: equality of parties and proper administration of justice. The probativeness/fair trial exclusionary rule seeks to equalize the parties to an ICL dispute by protecting a defendant from the unchecked power of a prosecutor to present evidence that is frivolous but damaging, even if the bar for admissibility is low.[38] Similarly, the procedural integrity exclusionary rule

[36] *STL Rules*, Rule 149(D). *See also ICTY Rules*, Rule 89(D); *ICTR Rules*, Rule 89(D).

[37] *ICTY Rules*, Rule 95; *ICTR Rules*, Rule 95; *STL Rules* Rule 162(A).

[38] To admit a document, a proponent must establish *prima facie* reliability and authenticity, but need not establish definitive proof of its reliability and authenticity. *Ayyash*, Special Tribunal for Lebanon, STL-11-01/T/TC, ¶¶11,13,20 (May 21, 2015); Prosecutor v Prlić, IT-04-74-AR73.16, International Criminal Tribunal for the former Yugoslavia, ¶27 (Nov. 3, 2009). A proponent may establish a document's *prima facie* reliability by supplying the court with such basic information as dates, names, signatures, or seals. *See* Prosecutor v Karemera, International Criminal Tribunal for Rwanda, ICTR-98-44-T, Decision on Motion for Admission of UNAMIR Documents, ¶¶7,10; Prosecutor v Ante Gotovina, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, IT-06-90-A, Public Redacted Version of the 21 June 2012 Motions Decision, ¶26 (Oct. 2, 2012) (interpreting similar appellate evidence rule for credibility). Alternatively, a proponent may establish sufficient probativeness of a document where its author acknowledges the accuracy of its contents, *Ayyash* at ¶40, but recognition by a witness is not required. Prosecutor v Bagosora, International Criminal Tribunal for Rwanda, ICTR-98041-T, Decision on Request to Admit United Nations Documents into Evidence, ¶4 (May 25, 2006); Prosecutor v Blaskic, International Criminal Tribunal for the former Yugoslavia, IT-95-14-T, Trial Chamber, Judgment, ¶35 (Mar. 3, 2000.

seeks to reinforce the tribunal's proper administration of justice by providing a "residual" ground for exclusion where the admission of an item into evidence would deprive the proceeding of "fundamental fairness."[39] In the sense that both of these exclusionary rules clearly map onto the procedural principles of the ICJ's evidentiary regime, it may be instructive to consider that they provide guidance to how illegally-obtained evidence would be treated at the ICJ.

III. Admissibility as Strategic Space-making

As evidenced by the ICJ's general approach to evidence and its specific treatment of issues of admissibility, the Court cannot accurately be described as having either a "free admissibility" approach to evidence or definitive rules of exclusion. Where rules of admissibility exist, they are either technical in nature and thus easily satisfied, absent deliberate or negligent noncompliance by a party, or where rules are based on the content of evidentiary submissions, their scope is rather pointillistic and ill-defined. This lends the evidentiary regime of the ICJ a somewhat diglossic quality, where the least consequential issues of admissibility are met with formality and clarity, while the most consequential issues are governed by abstract principles of party equality and proper administration of justice in applications of varying clarity.

The ICJ's divergent treatment of questions of admissibility represents a pointed example of what Helfer and Slaughter termed "constrained independence" in effect. Helfer and Slaughter theorized that international courts and tribunals operate as the fiduciary of states looking to "maximize[] the benefits of delegation to independent decision makers while minimizing its costs."[40]

[39] Prosecutor v Delalic, International Criminal Tribunal for the former Yugoslavia, Trial Chamber (Sept. 2, 1997) ¶¶44,55.
[40] Helfer & Slaughter, *supra* note 8, at 942.

The constrained independence of a court shapes the "strategic space" within which it makes procedural and substantive decisions.[41]

The two core evidentiary concerns of the ICJ reflect the constraints state influence (or the prospect thereof) has placed upon the Court's independence: first, states demand a degree of due process reflected in their treatment as sovereign equals before the Court, and second, they demand that procedural or evidentiary deficiencies not preclude judgment on an issue submitted for interstate dispute resolution. These two demands seemingly pull in different directions, with the former suggesting an appetite for greater reliance on clear *ex ante* rules and adherence to formal procedures, while the later disfavors formalities where they create impediments to resolution of the discrete dispute at hand. To further apply the comparison to evidence, states' demands create a tension between greater specificity in rules of admissibility and flexible approaches to prevent evidentiary deficiencies from hobbling judicial settlement.

In essence, the ICJ has addressed the conundrum of its constrained independence by engaging in strategic space-making. Where *ex ante* procedural rules for the admissibility of evidence can be imposed with minimal impact on parties, it has done so, framing clear constraints on the timing and form in which evidence may be submitted. Notably, these time–form rules are often found in the Rules and Practice Directions of the Court, rather than its Statute, signifying their status as an exercise and expansion of the Court's judicial independence. On the other hand, the Court has acted with much greater opacity and tentativeness in responding to admissibility questions concerning the content of evidentiary submissions, which might have a significantly greater impact on states' interests and ability to continue with judicial settlement. In effect, the Court's practice suggests a reticence to exercise judicial independence in framing clear rules where the proper administration of justice in a

[41] *Id.* (referencing the "strategic space" concept expounded in Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 98 AMER. J. INT'L L. 247, 249 (2004)).

given case depends so much on the interests of the parties to it. The Court requires the flexibility and ambiguity of its current approach to content-based admissibility questions to operate within the constraints of its "fiduciary" relationship with states before it. Indeed, the only content-based exclusionary rule that the ICJ has clearly accepted in its jurisprudence is one where the Court can be seen as giving effect to the will of states as evidenced by their participation in prior negotiations, rather than one introducing any extrinsic substantive limits.

Conclusion

Ultimately, the evidentiary regime of the ICJ reflects both the Court's broad authority to set its own rules of procedure and its constrained independence to shape them in such a way that addresses the conflicting demands of the states seizing it for judicial resolution of disputes. Two principles animate the Court's practice and rules regarding admissibility: equality of the parties and the proper administration of justice. Unsurprisingly, these align closely with states' at-times contradictory demands for clear *ex ante* rules and flexibility to reach a decision on the merits. In meeting these demands, the ICJ has engaged in strategic space-making to assert judicial independence and create clear admissibility rules on technical matters where they will be tolerated while maintaining doctrinal ambiguity on sensitive, content-based issues of admissibility.

Applicant Details

First Name	**Aditya**
Last Name	**Trivedi**
Citizenship Status	**U. S. Citizen**
Email Address	**aditya.trivedi@nyu.edu**
Address	**Address** Street **72 WILLOUGHBY ST** City **Brooklyn** State/Territory **New York** Zip **11201** Country **United States**
Contact Phone Number	**2625270290**

Applicant Education

BA/BS From	**Princeton University**
Date of BA/BS	**May 2016**
JD/LLB From	**New York University School of Law** **https://www.law.nyu.edu**
Date of JD/LLB	**May 22, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Journal of Legislation and Public Policy**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Hemphill, C. Scott
hemphill@nyu.edu
212.992.6156

Hershkoff, Helen
helen.hershkoff@nyu.edu
212-998-6715

Cox, Adam
adambcox@nyu.edu
(212) 992-8875

References

Carson Olsheski, colsheski@desmaraisllp.com, 212-808-2911;

Madeline Byrd, maddybyrd8@gmail.com, 585-748-4576;

Suganya Sivachalam, suganya.sivachalam@gmail.com, 469-426-4756

This applicant has certified that all data entered in this profile and any application documents are true and correct.

June 28, 2023

The Honorable Morgan Christen
Old Federal Building
605 West Fourth Avenue, Suite 252
Anchorage, AK 99501-2248

Dear Judge Christen:

I am a rising third-year student at the New York University School of Law and the Editor-in-Chief of the New York University Journal of Legislation and Public Policy. I am interested in a clerkship position in your chambers for the 2025–26 term.

I seek to build a career as an antitrust litigator. Following some time in private practice, I hope to join a state or federal regulatory agency. An appellate court clerkship in a circuit with one of the most active antitrust dockets in the country will be invaluable experience for my career. Having spent my pre-law school career working in the technology industry in California, I hope to practice in this circuit following my clerkship.

My resume, transcripts, and writing sample are enclosed. My writing sample is a brief written for the law school's internal moot court competition, for which I was one of four finalists.

All three of my recommendation letters are written by New York University law professors: Professor Adam Cox (212-992-8872), Professor Helen Hershkoff (212-998-6285), and Professor Scott Hemphill (212-992-6156). I have taken courses from all three professors and served as a research assistant for the latter two. I have additionally served as a teaching assistant for Professor Hershkoff's first-year Civil Procedure course.

I can be reached at (262) 527-0290 and aditya.trivedi@nyu.edu. Please let me know if I can provide any additional information that would be helpful. Thank you for your consideration.

Respectfully,
/s/ Aditya H. Trivedi
Aditya H. Trivedi

ADITYA TRIVEDI
72 Willoughby Street, #3B
Brooklyn, NY 11201
(262) 527-0290
aditya.trivedi@nyu.edu

EDUCATION

NEW YORK UNIVERSITY SCHOOL OF LAW, New York, NY
Candidate for J.D., May 2024 *(Unofficial GPA: 3.748)*
Honors: Journal of Legislation and Public Policy, Editor-in-Chief
Marden Moot Court Competition, Finalist
Robert McKay Scholar (top 25% after four semesters)
Activities: American Constitutional Society, Treasurer
Privacy Research Group, Student Fellow
Teaching Assistant, Professor Helen Hershkoff (Fall 2022)
Research Assistant, Professor Helen Hershkoff (Summer & Fall 2022), Professor C. Scott Hemphill (Spring 2023), Center for Civil Justice (Academic Year 2022 – 2023)

PRINCETON UNIVERSITY, Princeton, NJ
A.B. in Physics, *cum laude,* Certificates in Engineering Physics and Computer Science, May 2016
Senior Thesis: *Valley Splitting in Si/SiGe Quantum Dots*
Honors: Jeffrey O. Kephart '80 Engineering Physics Award
Engineering Physics Independent Work Award
Walter E. Hope Extemporaneous Speaking Prize
Activities: *Daily Princetonian*, Editorial Board
South Asian Students' Association, Co-President
Innovation Magazine, Editor, Senior Writer

EXPERIENCE

COVINGTON & BURLING, San Francisco, CA & Los Angeles, CA
Summer Associate, May 2023 – July 2023

DESMARAIS LLP, New York, NY
Summer Associate, May 2022 – July 2022
Drafted motion *in limine* for a patent litigation matter. Assisted attorneys in a pro bono asylum matter. Participated in an intensive week-long mock trial training exercise. Conducted legal research on patent litigation issues.

FACEBOOK, San Francisco, CA
Marketing Science Partner, January 2019 – July 2021
Advised high-growth startups on digital advertising and privacy-safe marketing strategies. Ran and analyzed hundreds of controlled advertising experiments. Worked across teams to build internal tools.

MASTERCARD, San Francisco, CA
Senior Business Consultant, June 2017 – December 2018
Advised large corporate clients spanning the retail, restaurant, and telecom industries on using the scientific method to make business decisions. Managed day-to-day of large client engagements. Mentored junior employees.

THINAIR LABS, Palo Alto, CA
Software Engineer, July 2016 – March 2017
Built UI of our flagship data protection product. Improved and extended key product features.

ADDITIONAL INFORMATION

Published scientific author in *Nanoscale* (2015). Conversational in Spanish. Enjoy learning languages, baking, weightlifting, and cheering for Wisconsin sports teams.

Name: **Aditya H Trivedi**
Print Date: **06/07/2023**
Student ID: **N17436651**
Institution ID: **002785**
Page: **1 of 1**

New York University
Beginning of School of Law Record

Fall 2021

School of Law
Juris Doctor
Major: Law

Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Britta M Redwood			
Torts	LAW-LW 11275	4.0	B+
Instructor: Mark A Geistfeld			
Procedure	LAW-LW 11650	5.0	A-
Instructor: Helen Hershkoff			
Contracts	LAW-LW 11672	4.0	A
Instructor: Richard Rexford Wayne Brooks			
1L Reading Group	LAW-LW 12339	0.0	CR
Instructor: Christopher Jon Sprigman			

	AHRS	EHRS
Current	15.5	15.5
Cumulative	15.5	15.5

Spring 2022

School of Law
Juris Doctor
Major: Law

Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Britta M Redwood			
Legislation and the Regulatory State	LAW-LW 10925	4.0	A
Instructor: Adam B Cox			
Criminal Law	LAW-LW 11147	4.0	A-
Instructor: Ekow Nyansa Yankah			
1L Reading Group	LAW-LW 12339	0.0	CR
Instructor: Christopher Jon Sprigman			
Survey of Intellectual Property	LAW-LW 12469	4.0	A-
Instructor: Christopher Scott Hemphill			

	AHRS	EHRS
Current	14.5	14.5
Cumulative	30.0	30.0

Fall 2022

School of Law
Juris Doctor
Major: Law

Survey of Securities Regulation	LAW-LW 10322	4.0	A
Instructor: Stephen J Choi			
Criminal Procedure: Fourth and Fifth Amendments	LAW-LW 10395	4.0	A-
Instructor: Andrew Weissmann			
Orison S. Marden Moot Court Competition	LAW-LW 11554	1.0	CR
Constitutional Law	LAW-LW 11702	4.0	B+
Instructor: Kenji Yoshino			
Research Assistant	LAW-LW 12589	1.0	CR
Instructor: Helen Hershkoff			

	AHRS	EHRS
Current	14.0	14.0
Cumulative	44.0	44.0

Spring 2023

School of Law
Juris Doctor
Major: Law

Innovation Policy Colloquium	LAW-LW 10930	3.0	A
Instructor: Jeanne C Fromer			
Christopher Jon Sprigman			
Antitrust Law	LAW-LW 11164	4.0	A-
Instructor: Christopher Jon Sprigman			
Professional Responsibility and the Regulation of Lawyers	LAW-LW 11479	2.0	A
Instructor: Trisha Michelle Rich			
Orison S. Marden Moot Court Competition	LAW-LW 11554	1.0	CR
Innovation Policy Colloquium: Writing Credit	LAW-LW 11647	1.0	A
Instructor: Jeanne C Fromer			
Christopher Jon Sprigman			
Science and the Courts	LAW-LW 12668	2.0	A
Instructor: Jed S Rakoff			
Science and the Courts Seminar: Writing Credit	LAW-LW 12801	1.0	IP
Instructor: Jed S Rakoff			

	AHRS	EHRS
Current	14.0	13.0
Cumulative	58.0	57.0

McKay Scholar-top 25% of students in the class after four semesters
Staff Editor - Journal of Legislation & Public Policy 2022-2023

End of School of Law Record

TRANSCRIPT ADDENDUM FOR NYU SCHOOL OF LAW
JD CLASS OF 2023 AND LATER & LLM STUDENTS

I certify that this is a true and accurate representation of my NYU School of Law transcript.

Grading Guidelines

Grading guidelines for JD and LLM students were adopted by the faculty effective fall 2008. These guidelines represented the faculty's collective judgment that ordinarily the distribution of grades in any course will be within the limits suggested. An A + grade was also added.

Effective fall 2020, the first-year J.D. grading curve has been amended to remove the previous requirement of a mandatory percentage of B minus grades. B minus grades are now permitted in the J.D. first year at 0-8% but are no longer required. This change in the grading curve was proposed by the SBA and then endorsed by the Executive Committee and adopted by the faculty. Grades for JD and LLM students in upper-level courses continue to be governed by a discretionary curve in which B minus grades are permitted at 4-11% (target 7-8%).

First-Year JD (Mandatory)	**All other JD and LLM (Non-Mandatory)**
A+: 0-2% (target = 1%) (see note 1 below)	A+: 0-2% (target = 1%) (see note 1 below)
A: 7-13% (target = 10%)	A: 7-13% (target = 10%)
A-: 16-24% (target = 20%)	A-: 16-24% (target = 20%)
Maximum for A tier = 31%	***Maximum for A tier = 31%***
B+: 22-30% (target = 26%)	B+: 22-30% (target = 26%)
Maximum grades above B = 57%	***Maximum grades above B = 57%***
B: remainder	B: remainder
B-: 0-8%*	B-: 4-11% (target = 7-8%)
C/D/F: 0-5%	C/D/F: 0-5%

The guidelines for first-year JD courses are mandatory and binding on faculty members; again noting that a mandatory percentage of B minus grades are no longer required. In addition, the guidelines with respect to the A+ grade are mandatory in all courses. In all other cases, the guidelines are only advisory.

With the exception of the A+ rules, the guidelines do not apply at all to seminar courses, defined for this purpose to mean any course in which there are fewer than 28 students.

In classes in which credit/fail grades are permitted, these percentages should be calculated only using students taking the course for a letter grade. If there are fewer than 28 students taking the course for a letter grade, the guidelines do not apply.

Important Notes

1. The cap on the A+ grade is mandatory for all courses. However, at least one A+ can be awarded in any course. These rules apply even in courses, such as seminars, where fewer than 28 students are enrolled.
2. The percentages above are based on the number of individual grades given – not a raw percentage of the total number of students in the class.
3. Normal statistical rounding rules apply for all purposes, so that percentages will be rounded up if they are above .5, and down if they are .5 or below. This means that, for example, in a typical first-year class of 89 students, 2 A+ grades could be awarded.
4. As of fall 2020, there is no mandatory percentage of B minus grades for first-year classes.

NYU School of Law does not rank students and does not maintain records of cumulative averages for its students. For the specific purpose of awarding scholastic honors, however, unofficial cumulative averages are calculated by the Office of Records and Registration. The Office is specifically precluded by faculty rule from publishing averages and no record will appear upon any transcript issued. The Office of Records and Registration may not verify the results of a student's endeavor to define his or her own cumulative average or class rank to prospective employers.

Scholastic honors for JD candidates are as follows:

Pomeroy Scholar:	Top ten students in the class after two semesters
Butler Scholar:	Top ten students in the class after four semesters
Florence Allen Scholar:	Top 10% of the class after four semesters
Robert McKay Scholar:	Top 25% of the class after four semesters

Named scholar designations are not available to JD students who transferred to NYU School of Law in their second year, nor to LLM students.

Missing Grades

A transcript may be missing one or more grades for a variety of reasons, including: (1) the transcript was printed prior to a grade-submission deadline; (2) the student has made prior arrangements with the faculty member to submit work later than the end of the semester in which the course is given; and (3) late submission of a grade. Please note that an In Progress (IP) grade may denote the fact that the student is completing a long-term research project in conjunction with this class. NYU School of Law requires students to complete a Substantial Writing paper for the JD degree. Many students, under the supervision of their faculty member, spend more than one semester working on the paper. For students who have received permission to work on the paper beyond the semester in which the registration occurs, a grade of IP is noted to reflect that the paper is in progress. Employers desiring more information about a missing grade may contact the Office of Records & Registration (212-998-6040).

Class Profile

The admissions process is highly selective and seeks to enroll candidates of exceptional ability. The Committees on JD and Graduate Admissions make decisions after considering all the information in an application. There are no combination of grades and scores that assure admission or denial. For the JD Class entering in Fall 2021 (the most recent entering class), the 75th/25th percentiles for LSAT and GPA were 174/170 and 3.93/3.73.

Updated: 10/4/2021

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PRINCETON UNIVERSITY

ADITYA HARIPRASAD TRIVEDI entered Princeton as a First-Year Student on 09/13/12.
Received AB degree concentrating in the Department of Physics on 05/31/16 with Honors in Physics. This transcript prepared on 01/23/20.

Fall Term 2012-2013 (First Year)			Grade	Courses
ISC	231	Integ/Quantitative Intro to Nat Sci I	A	1.0
ISC	232	Integ/Quantitative Intro to Nat Sci I	A	1.0
MAT	203	Advanced Vector Calculus	B	1.0
WRI	155	Writing Seminar	A	1.0

Spring Term 2012-2013 (First Year)			Grade	Courses
ISC	233	Integ/Quantitative Intro to Nat Sci II	B+	1.0
ISC	234	Integ/Quantitative Intro to Nat Sci II	B+	1.0
MAT	204	Advanced Linear Algebra with Application	A	1.0
SLA	220	The Great Russian Novel and Beyond	P	1.0
SPA	108	Advanced Spanish	A	1.0

Fall Term 2013-2014 (Sophomore)			Grade	Courses
CHM	303	Organic Chemistry I: Biological Emphasis	A	1.0
MAE	305	Mathematics in Engineering I	A	1.0
NES	269	The Politics of Modern Islam	A-	1.0
PHY	205	Classical Mechanics B	B+	1.0
PSY	207	Abnormal Psychology	A-	1.0

Spring Term 2013-2014 (Sophomore)			Grade	Courses
COS	226	Algorithms and Data Structures	A	1.0
ELE	298	Sophomore Independent Work	A-	1.0
MAE	306	Mathematics in Engineering II	A-	1.0
PHY	208	Principles of Quantum Mechanics	A-	1.0
WWS	373	Welfare, Economics and Climate Change Mi	B	1.0

Fall Term 2014-2015 (Junior)			Grade	Courses
COS	217	Introduction to Programming Systems	B+	1.0
PHY	301	Thermal Physics	A-	1.0
PHY	305	Introduction to Quantum Theory	A-	1.0
SOC	405	The Sociology of Law	B+	1.0
PHY		Junior Independent Work	A-	1.0

Spring Term 2014-2015 (Junior)			Grade	Courses
COS	448	Innovating Across Tech, Bus, & Mkts	A-	1.0
COS	598F	Internet Law and Policy	A	1.0
EGR	351	Engineering Projects - Community Service	A	1.0
PHY	304	Advanced Electromagnetism	B	1.0
PHY	312	Experimental Physics	B	1.0
PHY		Junior Independent Work	A	1.0

Fall Term 2015-2016 (Senior)			Grade	Courses
COS	432	Information Security	A	1.0
PHY	406	Mod Phy II:Nuclear & Elem Particle Phys	A	1.0
WWS	370	Ethics and Public Policy	A-	1.0

Spring Term 2015-2016 (Senior)			Grade	Courses
COS	424	Fundamentals of Machine Learning	B+	1.0
ENG	345	19th-Century Fiction	P	1.0
LIN	201	Introduction to Language & Linguistics	A	1.0
PHY		Senior Departmental Exam	B	
PHY		Senior Thesis	B+	2.0

Polly Winfrey Griffin, Registrar

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PRINCETON UNIVERSITY

ADITYA HARIPRASAD TRIVEDI ----Continuation of transcript

REMARKS:
Granted 2 Units of Advanced Placement in Biology
Granted 2 Units of Advanced Placement in Chemistry
Granted 1 Unit of Advanced Placement in English
Granted 2 Units of Advanced Placement in Economics
Granted 2 Units of Advanced Placement in History
Granted 2 Units of Advanced Placement in Mathematics
Granted 2 Units of Advanced Placement in Physics
2014-2015 Awarded THE KUSAKA MEMORIAL PRIZE IN PHYSICS
2015-2016 Awarded THE ALLEN G. SHENSTONE PRIZE IN PHYSICS
2015-2016 Awarded THE JEFFREY O. KEPHART '80 ENGINEERING PHYSICS AWARD
Received the Engineering Physics Certificate on 05/31/16
Received the Applications of Computing Certificate on 05/31/16

End of transcript

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PRINCETON UNIVERSITY

GRADING SYMBOLS

In undergraduate courses (numbered below 500) and independent work

A+ Exceptional; significantly exceeds the highest expectations for undergraduate work
A Outstanding; meets the highest standards for the assignment or course
A- Excellent; meets very high standards for the assignment or course
B+ Very good; meets high standards for the assignment or course
B Good; meets most of the standards for the assignment or course
B- More than adequate; shows some reasonable command of the material
C+ Acceptable; meets basic standards for the assignment or course
C Acceptable; meets some of the basic standards for the assignment or course
C- Acceptable, while falling short of meeting basic standards in several ways
D Minimally acceptable; lowest passing grade
F Failing; very poor performance
P Grades of A+ through C- in courses taken on pass/D/fail basis (prior to 1988-89, earned grades of A+ through D were converted to P) Satisfactory
AUD Completion of required work in a course taken on an audit basis
INC Course not completed at end of term (late completion authorized)
T Course successfully completed at another institution for Princeton credit
UNR Course grades not reported by instructor
W Student withdrew from the University after the term's ninth week of class

In graduate courses (numbered 500 and above)

With the exception of T and W, all of the foregoing grading symbols are used in graduate courses. The following symbols may also appear:

HP High Pass (used in some graduate courses in the School of Architecture)
LP Low Pass (used in some graduate courses in the School of Architecture)
N or * No grade given in the course. Between 1948-49 and 1973-74, represented by N; from 1974-75, represented by *

GRADING POLICY 2004-2014

From fall term 2004-05 through spring term 2013-14, the faculty had a common grading expectation for every department and program: A's (A+, A, A-) were to account for less than 35 percent of the grades given in undergraduate courses and less than 55 percent of the grades given in junior and senior independent work. Each department or program determined how best to meet these expectations. In the fall term 2014-15, the faculty reaffirmed rigorous and transparent assessment measures and removed a numeric target for the percent of A grades.

COURSE OF STUDY

Undergraduate students at Princeton enroll in a four-year course of study as candidates for the degree of Bachelor of Arts (A.B.) or the degree of Bachelor of Science in Engineering (B.S.E.). Undergraduate course credit is awarded in the form of course units. Each undergraduate course is one course unit; one course unit may be considered the equivalent of 4.0 semester hours. The A.B. program consists of eight terms of full-time study to satisfy the requirement of 31 courses (30 courses for students matriculating before 2001). Beginning in the junior year a candidate for the A.B. degree undertakes a program of departmental concentration including course work, independent study in the junior year, a two-term senior thesis, and a departmental examination at the end of the senior year. The B.S.E program consists of eight terms of full-time study to satisfy the requirement of 36 courses, which usually include one or two terms of independent work. B.S.E. students pursue departmental concentrations beginning in the sophomore year. Prior to fall term 1974-75, an undergraduate's departmental courses were indicated by a (D) preceding the course title. In addition to the departmental concentration, many students elect to pursue certificates in one or more programs, nearly all of which are interdisciplinary.

Graduate students pursue full-time study toward the Ph.D. degree in the arts and sciences, engineering, architecture, and public affairs; and final professional master's degrees in architecture, engineering, finance, Near Eastern studies, public affairs, and public policy. To qualify for the Ph.D., a candidate spends at least one academic year in residence, passes the general examination, presents an acceptable dissertation, and passes the final public oral examination. Additional requirements for the Ph.D. vary by program. Ph.D. candidates may earn a Master of Arts degree incidentally as part of the course of study toward the Ph.D. Requirements for a final professional master's degree vary by program. Graduate students who are enrolled full time and in residence hold regular student status as they pursue work toward the degree. Students registered *in absentia* are also enrolled full time but are absent from campus in order to make use of materials, facilities, and expertise not available in residence. In their last years of enrollment, the majority of post-generals Ph.D. students take no courses, but pursue full-time research toward completion of the dissertation. Ph.D. students who come to the end of the defined program length without having completed all requirements for the degree may hold dissertation completion enrollment (DCE) status for up to two years and enrollment terminated/degree candidacy continues (ET/DCC) status thereafter. DCE students are enrolled students. ET/DCC students are not enrolled, but they are entitled to submit a dissertation.

June 28, 2023

The Honorable Morgan Christen
Old Federal Building
605 West Fourth Avenue, Suite 252
Anchorage, AK 99501-2248

Dear Judge Christen:

It is my pleasure to write on behalf of Aditya Trivedi, who has applied for a clerkship with you. He will be an excellent clerk, and has my strong recommendation.

I first got to know Aditya as a student in my Survey of Intellectual Property class, which examines the ways in which law channels innovation and creativity. He consistently asked insightful questions, often about the real-world implications of a particular doctrine and the policy considerations that informed it. These inquiries were likely informed by his pre-law school career in the tech industry, where he helped companies to make better data-driven decisions. I was happy but not surprised to see his excellent performance on the blindly graded exam.

Over the past semester, Aditya has assisted me as a research assistant on several projects. This work has included edits to a book chapter and article on trademark and antitrust topics, as well as a memo in support of a future paper. In all of this work I have appreciated his rigorous thinking, diligence, and curiosity. I am sure these strengths will serve him well as the incoming editor-in-chief of the law school's Journal of Legislation and Public Policy. I am looking forward to hearing more about an intriguing new project of his at the intersection of antitrust and privacy regulation.

Aditya's post-law school plan is to become a litigator working across multiple substantive fields—one of his passions is procedure—and then join an antitrust or consumer protection regulator down the line. A clerkship with you is a natural step along that chosen career path. I am confident Aditya will make an excellent clerk, and I hope you give his application most careful attention. If I can answer any questions or be of further assistance, please don't hesitate to let me know.

Sincerely,
C. Scott Hemphill

C. Scott Hemphill - hemphill@nyu.edu - 212.992.6156

New York University
A private university in the public service

School of Law
40 Washington Square South, Room 308C
New York, NY 10012-1099

Helen Hershkoff
Herbert M. and Svetlana Wachtell Professor of Constitutional Law and Civil Liberties
Co-Director, The Arthur Garfield Hays Civil Liberties Program

Telephone: (212) 998-6285
Fax: (212) 995-4760
Email: helen.hershkoff@nyu.edu

June 5, 2023

Dear Judge:

I am very pleased to recommend Aditya Trivedi to you for a judicial clerkship following his graduation from New York University School of Law in May 2024. Aditya is Editor-in-Chief of the NYU Journal of Legislation and Public Policy; I am the journal's faculty supervisor and work closely with the EIC to plan events, deal with unforeseen problems, and strategize about priorities and goals. Aditya also was my student and worked as my Research Assistant. I hold him in very high regard and believe he would be an excellent judicial clerk—he is reliable, trustworthy, highly intelligent, exceptionally skilled, and deeply engaged with law and the legal profession.

I met Aditya when he was a 1L student in my required Procedure course. I taught the course via Zoom which of course made it somewhat more difficult to get to know the students. However, Aditya made a very positive impression—coming to office hours and asking insightful questions, joining special Zoom sessions when former students spoke about their careers, and writing excellent answers to the final examination questions. I was happy to invite Aditya to be a summer Research Assistant, and his work was terrific. Specifically, Aditya was part of a team of students helping to prepare annual supplementation to volume 14 of Wright & Miller's Federal Practice and Procedure, pertaining to the United States as a party. Aditya's assignment focused on non-monetary relief against the government under the Administrative Procedure Act, and included such issues as the scope of the immunity waiver, what constitutes an agency, levels of review, and justiciability. Although some of the material is covered in the 1L course in Law of the Regulatory State, much of it is not, and it also is an area that generates an extensive case law every year. Choosing the hundred or so cases for the annual supplement required Aditya's identifying and summarizing hundreds of cases—and he did so reliably, carefully, and cheerfully. I could not have hoped for better research support, and have every confidence that the skills he displayed will translate well in a fast-paced, intellectually challenging court.

Aditya brings a wealth of professional experience to his application. Before coming to NYU, he worked for five years in the technology industry, having majored in pure science—physics, applied physics, and computer sciences. He began as a software engineer at a now-defunct cybersecurity start-up, then worked as a consultant at a recently acquired subsidiary of Mastercard, and eventually found a role at Meta (then Facebook) working with start-ups on their marketing programs. In these positions Aditya reports that he learned to build co-worker

relations, to self-direct projects, to be pro-active when necessary, and to be mindful of the limits of technology (that last insight drove his decision to apply to law school). He is thoughtful, curious, and diligent, as well empathetic and well organized.

Aditya has contributed to the NYU community in diverse and important ways. He is Treasurer of the NYU American Constitution Society, managing and tracking finances and helping to plan events (most significantly, a voter protection trip of almost fifty NYU Law students to Philadelphia during the 2020 election). He also has served as a Research Assistant to two other law professors, on antitrust policy and state court data. He competed in the Marden Moot Court and participated as a 1L in the Privacy Research Group.

Finally, I want to emphasize that Aditya is kind, likable, and down to earth. He has told me that his greatest inspiration is his mother—an immigrant woman who worked in the medical field while raising three children and encouraging them to pursue education and to strive for excellence. I've never met her, but she has every reason to be extraordinarily proud of her son.

I recommend Aditya with warmest enthusiasm and confidence that he will be a highly superior judicial clerk.

Thank you for your consideration.

Sincerely,

Helen Hershkoff

ADAM B. COX
Robert A. Kindler Professor of Law

New York University School of Law
40 Washington Square South, 509
New York, NY 10012-1099
212 992 8875
adambcox@nyu.edu

June 5, 2023

Dear Judge:

I write to warmly recommend Aditya Trivedi for a clerkship in your chambers.

By way of background, I am a professor of law at NYU School of Law, where I teach and write about immigration law, constitutional law, and administrative law, among other subjects. Before joining NYU's faculty I taught at the University of Chicago Law School.

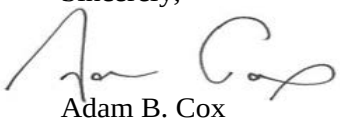
I got to know Aditya during his 1L year when he was a student in my section of Legislation and the Regulatory State (LRS), a required first-year course that introduces students to administrative law and statutory interpretation.

Aditya wrote one of the top handful of exams in my ninety-nine person LRS section. Indeed, on the first of the two main questions on the exam, no one in the class wrote a stronger answer than Aditya. The question, a challenging statutory interpretation problem designed to test students' abilities to untangle complexity in a legal problem and then to describe the logic of the problem in clear terms, befuddled a significant number of students in the course. But Aditya's answer was a model of clarity and concision. It reflected the impressive analytic skills I had so often seen him display in our classroom conversations and during my office hours.

Aditya also has an academic background and pre-law school experience that prepare him well for both his clerkship the future career in antitrust, technology, and administrative law that he hopes to build. His undergraduate work in physics and computer science is, I'd be willing to wager, part of what gave him the analytic skills that stood out so frequently to me in our interactions. As someone who had a similar undergraduate background, I have experience with how valuable, if unusual, that background can be in promoting the sort of clarity and precision in thinking that is crucial to producing incisive, easy to understand legal analysis.

Please let me know if there is any additional information I can provide about Aditya. You can reach me at my office or on my mobile at (917) 407-8282.

Sincerely,



Adam B. Cox

COVER NOTE

This is a draft of the brief written for the Spring 2023 (semifinal) round of the Marden Moot Court competition, New York University School of Law's internal moot court competition. The briefed issue is whether the prison mailbox rule (as established in Houston v. Lack) extends to represented, incarcerated litigants. I represented the incarcerated litigant in a suit against the United States under the Federal Tort Claims Act. The District Court for the District of "Eagle State" held that the rule did not extend to represented litigants, and the Court of Appeals for the "Fourteenth Circuit" reversed. The Supreme Court granted cert. The cover sheet, question presented page, table of contents, and table of authorities have been omitted, but the body of the brief is reproduced in full. I am the only person that has edited this writing in any capacity.

STATEMENT OF THE FACTS

Paul Young ("Young") is an inmate at Fairview Correctional Facility ("Fairview"), a federal penitentiary located in Eagle State. (R. at 13.) On February 14, 2017, he suffered a brutal attack at the hands other incarcerated individuals and prison guards. (R. at 3.) Young's attackers entered his cell unprompted and began beating him severely. (R. at 3.) Young was badly injured; he suffered a traumatic brain injury, multiple lacerations, and nerve damage that has since resulted in chronic pain. (R. at 13.) Fairview medical staff refused to treat him, and Young was released back into the general prison population. (R. at 13.)

Young began pursuing a claim under the Federal Tort Claims Act ("FTCA") prior to the expiration of the two-year statute of limitations. (R. at 13.) Under the FTCA, Young needed to file form SF-95 with the Bureau of Prisons before February 14, 2019. (R. at 13.) Young struggled to find competent counsel and retained new counsel in January 2019. (R. at 13.) As the deadline approached, Young grew apprehensive that his new counsel would not be able to file the form in time. (R. at 13.) Therefore, on February 8, nearly a full week before the deadline, Young transmitted a completed form to a prison official in charge of handling outgoing legal mail. (R. at 13.) The Bureau of Prisons stamped Young's notice as received on February 15, 2019.

SUMMARY OF THE ARGUMENT

Young's filing was timely under the prison mailbox rule. When a prisoner transmits a filing to a prison official tasked with handling mail before the filing deadline, the filing should be deemed timely. This rule should apply to represented litigants, and therefore applies to Young.

First, this Court's precedent justifies extending the rule to all incarcerated litigants. The rule as established in Houston v. Lack, 487 U.S. 266 (1988) was meant to place incarcerated

litigants on equal footing with free litigants. The two justifications for the rule — incarcerated litigant's lack of control over the litigation process and the agency relationship of the prison mail system and the Court — apply to all litigants.

Second, representation does not subvert these justifications. In the prison setting, representation does not result in substantially more control over the filing process. Additionally, incarceration erodes the attorney-client relationship and degrades the extent to which an attorney can effectively act as a client's agent.

Thus, the prison mailbox rule should apply uniformly to all litigants. A uniform rule would avoid underapplication of the mailbox rule. Such a rule would rely on existing prison infrastructure and thus would not create safety or budgetary issues. The Prison Litigation Reform Act sufficiently protects defendants from being unnecessarily hailed to court. An expanded rule would promote efficiency and consistency by avoiding fact-intensive inquiries, limiting judicial discretion, and promoting uniformity in federal procedural rules.

ARGUMENT

On an appeal of a grant of summary judgement for claims under the Federal Tort Claims Act, legal conclusions are reviewed de novo. See Brownback v. King, 141 S.Ct. 740 (2019).

I. THE MAILBOX RULE IS MEANT TO PLACE INCARCERATED AND FREE LITIGANTS ON EQUAL FOOTING BY RESTORING CONTROL AND AGENCY TO THE INCARCERATED LITIGANTS

A. The Mailbox Rule Is a Rule of Equality Between Incarcerated and Free Litigants

In Houston v. Lack, 487 U.S. 266 (1988), this Court held that under Federal Rule of Appellate Procedure 4(a)(1), a pro se prisoner's notice of appeal is considered filed at the moment of delivery to prison authorities. The Court noted that while mailbox rules have been disfavored for filings, this general rule did not apply to the facts at hand. Id. at 274. The Court

invoked two traditional justifications for the common law mailbox rule — the common agency of the prison mail system and the lack of control of incarcerated litigants — to justify a mailbox rule for the prison setting. Courtenay Canedy, Note, The Prison Mailbox Rule and Passively Represented Prisoners, 16 Geo. Mason L. Rev. 773, 783–84 (2009); see also id. at 270 ("the jailer is in effect the clerk of the District Court within the meaning of Rule 37") (citation omitted); id. at 275 ("the moment at which pro se prisoners necessarily lose control over and contact with their notices of appeal is at delivery to prison authorities").

The Court's primary goal was placing incarcerated litigants on equal footing with other litigants. See id. at 270 (describing the many steps that a free litigant can take that prisoners cannot); Lewis v. Richmond City Police Dept., 947 F.2d 733, 735 (4th Cir. 1991) ("fundamentally, the rule in *Houston* is a rule of equal treatment"). The reasoning of the Houston court applies to represented litigants. See United States v. Moore, 24 F.3d 624, 625 (4th Cir. 1994) ("Likewise, there is little justification for limiting *Houston*'s applicability to situations where the prisoner is not represented by counsel"). Accordingly, when the Court amended the Federal Rules of Appellate Procedure following Houston, the Court did not limit the rule to pro se litigants. Id. at 626 n.3; see also United States v. Craig, 368 F.3d 738, 740 (7th Cir. 2004) ("A court ought not pencil 'unrepresented' or any extra word into the text of Rule 4(c), which as written is neither incoherent nor absurd").

B. The Prison Mailbox Rule's Control Justification Applies to All Incarcerated Litigants

The Houston Court adopted the control justification of the common law mailbox rule. Canedy, supra, at 783–84. The common law mailbox rule deems acceptance of an offer to be when an offeree places the acceptance in the mailbox. Restatement (Second) of Contracts § 63 (Am. L. Inst. 1981). The rule finds its basis in English common law. Canedy, supra, at 774.

When American courts adopted the rule, they justified its application by arguing that the loss of control sufficiently manifested assent. See, e.g., Mactier's Adm'rs v. Frith, 6 Wend. 103, 120 (N.Y. 1830) ("but a letter written would not be an acceptance, so long as it remained in the possession or under the control of the writer").

The Houston Court considered two dimensions of control. First, an incarcerated litigant does not have control over the individuals to whom he submits the notice. Upon submitting a filing to prison guards, the litigant cedes control over the processing of the filing to those officials. Houston, 487 U.S. at 271. The litigant cannot "control or supervise" prison officials, who have "every incentive to delay" the timely filing of the litigant's papers. Id. In contrast, a free litigant can hire a "private express carrier" whose progress they may monitor. Id. Second, an incarcerated litigant does not have control over his own movement. Unlike a free litigant, an incarcerated one "cannot personally travel to the courthouse to see that the notice is stamped 'filed' or to establish the date on which the court received the notice." Id. The only information an incarcerated litigant has is the date he submitted his notice to prison authorities. Id.

The control justification applies with equal force to both pro se and represented litigants like Young. Incarceration, by definition, restricts movement. Outside of the usual sequestration that a prison sentence brings, prison officials have considerable discretion in defining the parameters of a prisoner's confinement, including and up to administrative segregation, commonly known as solitary confinement. See, e.g., Davis v. Ayala, 576 U.S. 257, 286 (2015) (Kennedy, J., concurring) (arguing that while prisons have discretion to use solitary confinement, the deleterious effects of the practice should not be overlooked). Young was not placed in solitary confinement; the restriction on his movement was even more severe. The assault and ensuing chronic pain he endured were barriers to his physical movement beyond that which can

be expected from incarceration alone. Young's case presents a particularly powerful example of prison officials' incentive to delay: Young is pursuing an action against prison officials.

C. The Prison Mailbox Rule's Agency Justification Applies to All Incarcerated Litigants

Courts have justified the common law rule by referencing the common agency of the post office. Early cases adopting the rule reasoned that under agency law, the post office as a "common agent" of both the offeror and the offeree. See, e.g., Lucas v. W.U. Tel. Co., 109 N.W. 191, 192 (Iowa 1906) (describing the common agency of the post office). The agency of the post office arises from the relationship between the contracting parties. Id. Given that the parties' pre-contractual communication occurred through the mail, they "must have . . . [contemplated]" that letters would continue play a role in communication. Id.

The common law rule's agency rationale applies with even greater force in the prison setting. One criticism of the mailbox rule for offer acceptance is that the Post Office is no longer considered an agent of either party. See Paul Fasciano, Internet Electronic Mail: A Last Bastion for the Mailbox Rule, 25 Hofstra L. Rev. 971, 982 (1997) (arguing that the Post Office is an "independent contractor"). This critique is inapplicable to the prison setting. Beginning nearly a quarter century before Houston, members of this Court argued that prison officials act as agents of the Court. See Fallen v. United States, 378 U.S. 139, 144 (1964) (Stewart, J., concurring) (arguing that though the applicable federal rule required a notice of appeal be filed with the clerk of the Court, for an incarcerated litigant, "the jailer is in effect the clerk of the District Court"). The Houston Court agreed. 487 U.S., at 270. Just as prisoners may notify the Court via the prison mails, notice directed to the prisoner is sufficient if effected through the same system. Dusenbery v. United States, 534 U.S. 161, 168–69 (2002); accord Jones v. Flowers, 547 U.S. 220, 238 (2006) (remarking that the notice in Dusenbery was sufficient if the "Government was

aware that someone at the prison had signed for the prisoner's notice letter"). Thus, from the position of prisoners, the officials managing prison mails have "apparent authority" to act on behalf of the system that placed them behind bars. See Restatement (Third) of Agency, § 2.03 (Am. L. Inst. 2006) (defining apparent authority as based on the reasonable belief on the part of a third party that an actor has the power to affect legal relations with a putative principal based on the principal's manifestations). Receiving notice of proceedings from the prison mail system is thus "within the contemplation" of the Bureau of Prisons. Lucas, 109 N.W. at 192.

From Young's perspective, the prison mailbox service was the only agent to whom he had access. Unaware of whether his attorney was sufficiently briefed his case, Young relied on prison officials to route his form to the Bureau of Prisons. Had Young not believed in the agency of the prison mailroom, such an action would have been irrational or counterproductive.

II. REPRESENTATION DOES NOT PROVIDE SUFFICIENT CONTROL OR CREATE AN ADEQUATE AGENCY RELATIONSHIP TO PLACE INCARCERATED AND FREE LITIGANTS ON EQUAL FOOTING

Extending the prison mailbox rule to represented prisoners recognizes that incarceration places limits on imprisoned litigants that free litigants do not face. The prison mailbox rule is "fundamentally a rule of equal treatment." Lewis, 947 F.2d at 735. The control and agency justifications the Houston Court relied on apply to both pro se and represented incarcerated litigants; thus, equality requires extending the rule to all incarcerated litigants. As the Seventh Circuit put it, "prisoners may, in the interest of justice, require different filing rules." Censke v. United States, 947 F.3d 488, 492 (7th Cir. 2020).

A. Representation Does Not Lead to Enough Control Over The Filing Process

Control over the filing process requires both access to an outside agent to assist with the act of filing and the ability to prepare that filing. Some circuits have held that representation

affords an incarcerated litigant sufficient control over the filing such that the Houston rule does not apply. See, e.g., Cousin v. Lensing, 310 F.3d 843, 847 (5th Cir. 2002) (arguing that a represented, incarcerated litigant is able to exercise more control than a pro se incarcerated litigant because he can control the "conduct of his action" through counsel). This considers only a narrow scope of control over the filing. Prisoners have a constitutional right of access to courts, including having access to "tools . . . [required] . . . to challenge the conditions of their confinement." Lewis v. Casey, 518 U.S. 343, 355 (1996). Courts have acknowledged that this right of access includes gathering of evidence necessary to compile a filing for a meritorious claim. See id.; see also Turner v. Epps, 460 F. App'x 322, 327–28 (5th Cir. 2012) (arguing that plaintiff's constitutional access to courts claim based on denial of ability to access evidence did not succeed because underlying claim was not viable).

Incarceration diminishes control over the filing process for represented litigants. In addition to having "every incentive to delay" transmission of a prisoner's filing to the clerk of the Court (Houston, 487 U.S. at 271), prison officials can limit access to legal materials. Prison officials are given wide latitude in imposing restrictions on incarcerated litigants; any restriction that is "the product of prison regulations reasonably related to legitimate penological interests" cannot beget a constitutional claim. Casey, 518 U.S. at 362. This power can result in delayed receipt, loss, or destruction of legal materials. Prison officials may delay receipt of legal materials by prisoners undergoing lockdown procedures. Id. Officials can shuttle incarcerated litigants between facilities, creating multiple opportunities for loss of access to legal materials. See, e.g., Censke, 947 F.3d at 491 (describing the plight of a prisoner who lost access to legal materials after six transfers within two years). Finally, the security of an incarcerated litigant's papers is subject to the whims of prison officials, who may destroy legal papers under the cover

of safety rationales. Cf. Smith v. O'Connor, 901 F. Supp. 644, 649 (S.D.N.Y. 1995) (concluding that destruction of legal papers during cell search required evidence of "[deliberate] and [malicious]" conduct to state a claim that right of access was violated).

Young's experience with his attorney demonstrates the incomplete control that even a represented litigant can exercise over the process. Young struggled to secure legal assistance and finally sought to take matters into his own hands after being left in the dark about whether his legal representative was in fact assisting him with his claim. In a dangerous environment, Young had to prepare and file an unfamiliar administrative form without the advice of a knowledgeable agent. He sent his form with only the hope that it would arrive on time.

B. Incarceration Degrades The Agency Relationship with Legal Representatives

Lower courts have held that a legal representative is an agent through which an incarcerated litigant can act, obviating the need to rely on prison officials. See, e.g., Cousin, 310 F.3d at 847 ("[the prisoner] has an agent through whom he can control the conduct of his action, including the filing of pleadings"); United States v. Camilo, 686 F. App'x 645, 646 (11th Cir. 2017) (arguing that counsel is an agent through which a litigant may communicate with a court). While some lower courts consider the reality of the specific attorney/client relationship at issue, others only examine the fact of representation. Compare Stillman v. LaMarque, 319 F.3d 1199, 1201 (9th Cir. 2003) (describing the steps incarcerated litigant's attorney took), with Cousin, 310 F.3d at 847 (arguing in general terms about the role of counsel).

While a represented prisoner might nominally have an agent with whom to confer, prison infrastructure introduces significant barriers to that communication. Prison officials may restrict counsel from visiting incarcerated clients. See, e.g., Fed. Defs. of New York, Inc. v. Fed. Bureau of Prisons, 954 F.3d 118, 123–24 (2d Cir. 2020) (describing how government shutdowns, power

outages, and other facility conditions might prompt prison officials to heavily restrict or completely cut off the ability of counsel to visit a client). Prison infrastructure may even be insufficient to support phone conversations. Id.

Even in the absence of infrastructural issues, prison officials can impede the effectiveness of an attorney-client relationship. Physical isolation of prisoners from the general prison population may cut off access to legal assistance. Casey, 518 U.S. at 361–62. Decisions to isolate prisoners are typically subject to wide deference. Id. The physical sequestration inherent to incarceration may limit the ability of an attorney to effectively counsel her client at every stage of the process, beginning with compilation of a factual record. See Fed. Defs. Of New York, Inc., 954 F.3d at 124 (detailing how prison oversight over the times of attorney visits with incarcerated clients made it more difficult to "review discovery files," discuss "trial strategy," and conduct "expert interviews").

In addition to erecting structural barriers to accessing counsel, incarceration erodes attorney-client privilege. Prison officials may open mail addressed to a litigant even if the return address displays the name of the litigant's attorney. See Guajardo-Palma v. Martinson, 622 F.3d 801, 804–05 (7th Cir. 2010) (citing Wolff v. McDonnell, 418 U.S. 539 (1974)) (arguing that this Court has justified an "imperfect protection" of the privacy of attorney mail in the interest of prison security). Phone conversations fare no better. Bureau of Prison regulations command prison officials to allow unmonitored attorney-client phone calls. 28 C.F.R. § 540.102. However, prison officials are under no obligation to affirmatively convey this right to inmates and monitoring may occur due to prison error. See United States v. Novak, 531 F.3d 99, 101–03 (1st Cir. 2008) (recounting how incarcerated litigant was not informed of right to unmonitored phone call and prison error resulted in monitoring of an attorney-client phone call). Finally,

prisoner use of email to communicate with an attorney waives attorney-client privilege. See Arciero v. Holder, No. 14-00506 LEK-BMK, 2015 WL 5769223, at *4–5 (D. Haw. Sept. 30, 2015), aff'd sub nom. Mapuatuli v. Sessions, 714 F. App'x 730 (9th Cir. 2018) (describing how using BOP email service "Corrlinks" waives attorney-client privilege).

While incarceration presents multiple problems for prisoners looking to establish an agency relationship, lower courts have been willing to respect a prisoner's choice of filing agent. When counsel is successfully retained, courts examine the prisoner's behavior manifesting reliance on the agent. See Cretacci v. Call, 988 F.3d 860, 866–67 (6th Cir. 2021) (describing how choice of incarcerated litigant to rely on lawyer to file papers defeated application of mailbox rule). This respect of a prisoner's choice extends to the choice to involve non-lawyer third parties. See, e.g., Paige v. United States, 171 F.3d 559, 561 (8th Cir. 1999) (holding that mailbox rule does not apply to transmission of motion from litigant to brother); cf. United States v. Cicero, 214 F.3d 199, 204–05 (D.C. Cir. 2000) (denying tolling of statute of limitations because incarcerated litigant transmitted legal papers to jailhouse lawyer). In denying the mailbox rule to transmission to third parties, courts are concerned that such an extension would allow for "substantial revisions" prior to receipt by the court. See Cook v. Stegall, 295 F.3d 517, 521 (6th Cir. 2002) (justifying refusal to extend mailbox rule in case where litigant sent documents to his daughter due to possibility of revision).

This respect of agent choice should extend to Young's case. Young did not choose to have his attorney file his administrative filing. Young, having been unable to establish the requisite agency relationship, believed that the best chance he had to file on time was through the prison mail system. His filing showed that he relied neither on his counsel nor on any non-lawyer third party, unlike the litigants in the cases described above. Young was not seeking to

make an end run on filing deadlines. He instead hoped that he was sending his petition early enough to ensure receipt prior to the deadline.

III. A UNIFORM RULE WOULD ACHIEVE THE EQUALITY GOAL OF THE HOUSTON RULE AND PROMOTE UNIFORMITY OF RULES WITHOUT BURDENING PRISONS OR DEFENDANTS

Given that representation does not cure the deficits incarcerated litigants face, this Court should extend the rule to all incarcerated litigants. A uniform rule will both protect incarcerated litigants and avoid difficult factual inquiries that will reprise the circuit split as it exists today.

A. A Uniform Rule Best Achieves the Equality Goals of the Prison Mailbox Rule

A rule requiring a showing of unreasonable prison-caused delay to justify application of the mailbox rule will not place incarcerated litigants on equal footing with free ones. First, courts afford prisons wide deference in making decisions that might delay filing. See Casey, 518 U.S. at 361–62 (arguing that so long as prison conditions are "reasonably related to legitimate penological interests," constitutional claims against prison officials are not cognizable even if they result in harm to legal representation). Second, any claim of prison-caused delay presents an evidentiary problem. Prison officials control the evidence that would tend to prove that claim. Houston, 487 U.S. at 276. Thus, a claim of delay faces both a demanding legal standard and high barriers to acquire proof to meet it. Requiring an inquiry into whether prison officials delayed a particular filing will lead to underinclusive application of the mailbox rule.

An approach requiring examination of attorney conduct will also insufficiently protect incarcerated litigants' interests. Some lower courts have suggested that the rule should not apply when the attorney retained had "practiced law" according to the applicable state's definition. See Cretacci, 988 F.3d at 861 (arguing that incarcerated litigant's lawyer was practicing law under Tennessee definition of "practice of law"); Stillman, 319 F.3d at 1201, n.3 (same). This

approach underemphasizes the impact of the prison environment. The difficulties of litigating from prison may mean that the mailbox rule is a litigant's last resort. See, e.g, Cretacci, 988 F.3d at 866 (describing how prisoner attempted to use the mailbox rule after attorney failed to file complaint multiple times); Stillman, 319 F.3d at 1200–01 (explaining that after prison official failed to timely convey lawyer-prepared documents to litigant for signature, litigant attempted to take advantage of mailbox rule). Focusing on attorney conduct would result in prisoners bearing the risk that incarceration might result in delays notwithstanding an attorney's best efforts.

In Young's case, only a uniform mailbox rule would vindicate his rights. The record is silent on whether malice or incompetence by prison officials caused delay. Only prison officials may answer that question. These officials may be especially reticent to inquiries by a court, given that Young's claim is against their co-workers. Additionally, Young was struggling to access competent counsel. Doubting the competency of his representation and running out of time, Young tried to take matters into his own hands. Basing the decision to apply the mailbox rule on an inquiry into Eagle State licensing statutes ignores the reality of his confinement.

B. Extending the Mailbox Rule Will Not Burden Prisons or Disadvantage Defendants

Prisons may lawfully limit prisoners' ability to litigate for safety and budgetary reasons. Courts are willing to defer to prison officials' decision to limit access to legal resources for safety concerns. See, e.g., Akins v. U.S., 204 F.3d 1086, 1090 (11th Cir. 2000) (concluding that prison regulation prohibiting prisoners from accessing law library during lockdown not violative of Constitutional rights even though filing deadline passed during lockdown). Moreover, courts are unwilling to impose costs on prisons. See United States v. Gray, 182 F.3d 762, 766 n.3 (10th Cir. 1999) ("an indigent prisoner's right of access to the courts does not require provision of unlimited free postage for sending legal mail").

Extending the mailbox rule will not implicate either safety or budgetary concerns. Prison rules deemed necessary for safety typically involve restricting movement of prisoners. See, e.g., Cookish v. Cunningham, 787 F.2d 1, 5–6 (arguing that restricting access to prison library was necessary to maintain order). The mailbox rule governs when a filing is deemed timely and does not imply a right of access to the mail system. Additionally, extending the prison mailbox rule would not add additional costs. Prisons are under no obligation to provide free postage, even to vindicate a right of access to courts. Gray, 182. F.3d at 766 n.3. An expanded mailbox rule would therefore only result in a marginal increase in costs of handling prisoner mail.

Just as the burden to the prison system is not great, so too is any impact on fairness to government defendants. Time limitations primarily serve to protect the interest of defendants. Burnett v. New York Cent. R. Co., 380 U.S. 424, 428 (1965). Defendants have a right to be free from stale claims where "evidence has been lost, memories have faded, and evidence has disappeared." Id. However, "in the interest of justice," this policy of repose may be "outweighed" by a need to "[vindicate] plaintiff's rights." Id. Extending the rule to all incarcerated litigants vindicates their rights. The effect of an expanded rule would not create an unlimited expansion of the time period under which a defendant must be on notice; the "few extra days" that may pass does not "offend [notions] of fairness." Moore, 24 F.3d at 626.

Any impact to defendant fairness would be further ameliorated by existing statutory structure around prisoner litigation. The Prison Litigation Reform Act demands that prior to filing suit in federal court, a prisoner plaintiff must exhaust administrative remedies. 42 U.S.C. § 1997e(a). This requirement is mandatory. Woodford v. Ngo, 548 U.S. 81 (2006). Exhaustion protects administrative agency authority by providing an opportunity for an agency to correct its mistakes. Id. at 89. Exhaustion under the PLRA is meant to discourage litigation. See id. at 89–

90 (concluding that the exhaustion requirement under the PLRA is designed to introduce additional procedural requirements for those parties that would not voluntarily pursue them and would "prefer to proceed directly to federal court"). Given that prisoners face barriers to filing claims that free litigants do not, an expanded mailbox rule will likely not produce a deluge of new claims hailing officials into court.

Applying an extended rule to Young would neither burden Fairview nor disadvantage his unnamed attackers. Young reliance on his prison's existing mail system and generated neither additional costs nor security concerns. Pursuant to the Prison Litigation Reform Act, Young was attempted to exhaust administrative remedies offered by the Bureau of Prisons. 28 C.F.R. § 14.2(a). The form reached the correct agency only one day later than the deadline, a delay that hardly "offends [notions] of fairness." Moore, 24 F.3d at 626.

C. Extending the Mailbox Rule Would Simplify Judicial Decision-making and Promote Uniformity of Procedural Rules

A uniform mailbox rule would conserve judicial resources. The Houston court hoped that the rule would decrease disputes about filing. 487 U.S. at 275. However, the circuit split on whether the rule applies to represented litigants has introduced an avenue for increased litigation. Currently, some circuits demand that courts engage in fact-intensive inquiries around whether a litigant was truly represented. See, e.g., Cretacci, 988 F.3d at 861 (discussing the reasons that incarcerated litigant's relationship to attorney constituted "representation" under state law); Stillman, 319 F.3d at 1201 & n.3 (same). This standard is difficult to apply in practice. Cretacci, 988 F.3d at 872–73 (Readler, J., concurring) (arguing that a standard based on legal practice rules is unclear). A bright-line rule would obviate the need for time-intensive factual inquiries.

The prison system can support such a bright-line rule. The rule does not require an extensive inquiry into when a prisoner transferred his filing to prison authorities. Houston, 487

U.S. at 275–76. In deciding whether a prisoner's submission was timely filed, a court need only to examine the outgoing mail log maintained by prison staff. Id; see also Lewis, 947 F.2d at 734.

Extending the mailbox rule will promote uniformity of filing rules and create predictability for litigants. Certainty and predictability are important goals of the federal procedural rules. See Houston, 487 U.S. at 275–76; see also Hanna v. Plumer, 380 U.S. 460, 463 (1965) (expressing a desire for uniformity in procedural rules). However, the current state of the federal rules threatens this goal. Following Houston, this Court promulgated a change to the rules allowing an inmate to take advantage of the mailbox rule for notices of appeal. Fed. R. App. P. 4(c). The rule has been read to encompass both represented and pro se litigants. Craig, 368 F.3d at 740. This Court also adopted the mailbox rule for all appellate filings. See Fed. R. App. P. 25(a)(2)(A)(iii) ("A paper not filed electronically by an inmate is timely if it is deposited in the institution's internal mail system on or before the last day for filing . . ."). However, because this Court has not endorsed the rule across all filings, at least one circuit has endorsed applying the rule to some filings and not others. See Cretacci, 988 F.3d at 867 (describing Fourth and Seventh Circuit precedent as extending the prison mailbox rule to represented litigants only for notices to appeal). Extending the rule to all litigants, regardless of the filing at issue, would promote greater uniformity in procedural rules.

This Court is well positioned to create this uniformity. The mailbox rule is a creature of this Court's precedent. The Court has historically interpreted rules it has created. Hanna, 380 U.S. at 472–73 (describing procedure as "an area in which federal courts have traditionally exerted strong inherent power, completely aside from the powers Congress expressly conferred"). This Court regularly interprets the scope of filing rules. Cf. Lozano v. Montoya

Alvarez, 572 U.S. 1, 10 (2014) (discussing "equitable tolling" as "a long-established feature of American Jurisprudence").

Young's case illustrates the simplicity of administering the mailbox rule. The record unambiguously states that Young transmitted the filing to prison authorities six days before the filing deadline. An expanded rule would mean Young and the unnamed defendants could rely on the same rule throughout litigation of his FTCA claims and would not depend on Eagle State's professional licensing standard.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be affirmed. This Court should hold that when a prisoner transmits a legal filing to prison mail officials prior to the filing deadline, the mailbox rule applies regardless of whether the prisoner had representation.